



BUREAU of LABOR & INDUSTRIES

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

In the Matter of:

Frehoo, Inc. dba Stars Cabaret &
Steak House,

and

Pamela Colburn, Lisa Heinzman-
Myers, Jon Herkenrath, Randy Kaiser,
Todd Mitchell, and Jeff Struhar,
individually, under ORS
659A.030(1)(g),

Respondents.

Case No. 37-16

AMENDED
FINDINGS OF FACT
ULTIMATE FINDINGS OF FACT
CONCLUSIONS OF LAW
OPINION
ORDER

SYNOPSIS

The Agency established by a preponderance of the evidence that that Respondent Frehoo, Inc. ("Frehoo"), an adult entertainment club featuring nude female dancers, subjected a 15-year-old female dancer to unlawful sexual harassment by Frehoo's customers in violation of ORS 659A.030(1)(b) and OAR 839-005-0030(5), (7). The forum also concluded that Respondents Jon Herkenrath and Todd Mitchell aided and abetted the unlawful sexual harassment. ORS 659A.030(1)(g). Respondents Pamela Colburn, Lisa Heinzman-Myers, Randy Kaiser, and Jeff Struhar are not liable as aiders and abettors. The forum awarded the aggrieved person \$1,000,000 in compensatory damages for the mental and physical suffering she experienced as a result of the unlawful conduct. The forum also ordered Respondents Frehoo, Herkenrath, and Mitchell to cease and desist from continuing to violate laws pertaining to discrimination because of sex and sexual harassment in the workplace. ORS 659A.050(2), (4).

1 Following issuance of the Final Order in this matter, the order was appealed to the Oregon
2 Court of Appeals. The Court of Appeals affirmed in part. The Court of Appeals reversed
3 and remanded as to BOLI's conclusion that Respondents Randy Kaiser, Todd Mitchell
4 and Jeff Struhar aided and abetted the unlawful sexual harassment of the aggrieved
5 person and were joint and severally liable for the unlawful employment practice. *Frehoo,*
Inc., dba Stars Cabaret & Steak House, v. BOLI, 319 Or App 548, 564-65, 510 P3d 888,
898 (2022) rev den 370 Or 789, 524 P3d 957 (2023). On remand, the forum addressed
the issues identified by the court.

6 **NOTE:** The procedural history of this case is extensive and includes the ALJ's lengthy
7 rulings on several motions filed by the parties. For ease of reading, all procedural facts,
8 pre-hearing motions, and rulings on those motions are included as Appendix A to this
Final Order. Appendix A immediately follows the "Order" section of this Final Order that
bears the Deputy Commissioner's signature.

9 **IMPORTANT:** The Judicial Review Notice that customarily follows the " Order" section of
10 Final orders may be found on the last page of this Final Order.

11 The above-entitled case came on regularly for hearing before Kari Furnanz,
12 designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the
13 Bureau of Labor and Industries for the State of Oregon. The hearing was held on
14 November 9-10, 14-18, 29-30, December 1-2, 5-7, 2016, in Conference Rooms A and B
15 of the Oregon Employment Department, WorkSource Tualatin Office, 7995 SW Mohawk
16 Street, Tualatin, Oregon. Closing arguments were held on December 21, 2016, at the W.
17 W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, which was then
18 located at 800 NE Oregon Street, Portland, Oregon.

19 The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by
20 Chief Administrative Prosecutor Jenn Gaddis and Administrative Prosecutor Cristin
21 Casey, employees of the Agency. Anthony Reiner, Joel Shapiro and Janis Puracal,
22 attorneys for the Aggrieved Persons, were present throughout the hearing. Respondents
23 were represented by Courtney Angeli and Angela Ferrer, attorneys at law. Respondents
24

1 Jon Herkenrath, Randy Kaiser, Todd Mitchell and Jeff Struhar were present for the
2 majority of the hearing, but Herkenrath and Struhar were not present on some hearing
3 dates due to illness.

4 The Agency called the following witnesses¹ to testify in person: Maria Perez,
5 Rafael Colin, Chad Opitz (direct), Chris Lynch, Madelyn Brown, Jessica Ponaman, Dr.
6 Jon Conte, AP1, and AP2. The Agency called the following witnesses to testify by
7 telephone: Steven Toth, Cynthia Herring, Amy, Ashley, Melanie, Davey, Chad Opitz
8 (rebuttal).

9 Respondents called the following witnesses to testify in person: Maria Perez, Chad
10 Opitz, AP1, Casey, Jon Herkenrath, Dante, Ursula, James Marquardt, Megan, Moses,
11 Frank Richard Mangrum, Dr. Kevin McGovern, Sarah, Coni, Tony, Bob Stewart, Randy
12 Kaiser, Jennifer, Jeff Struhar, Taylor, and Todd Mitchell. Respondents called the
13 following witnesses to testify by telephone: Amy, Karen, Alexa, Tammy, Angelina
14 Spencer, Tim, Belen, Brittany, Hal, and Leslie.

15 The forum received into evidence:

16 a) Administrative exhibits X1 through X157 (submitted or generated prior to
17 hearing), and X158 through X193 (submitted or generated during or after hearing);

18 b) Agency exhibits A1-A19, A21-A32, A33a, A34a, A37-A49, portions of A50
19 (pp. 1, 4, 16 only), portions of A50a (pp. 5, 6, 7 only), A51-A52, A55, A57-A58, A60-A63,
20 A67, A71-A75, A86-A87, and A90-A93;

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23 ¹ Pursuant to interim protective orders issued by the ALJ in this case, the aggrieved persons will be referred
24 to throughout this document as AP1 and AP2. Additionally, employees/workers and former
employees/workers of Frehoo and other adult entertainment establishments will be referred to by their first
names only, with the exception of the named respondents in this case.

1 c) Respondents' exhibits R6-R8, R9, R13-R14, R18-R19, R22-R30, R32, R38,
2 R39-R40, R44, portions of R45 (pp. 18, 109-112, 130-134 only), R46-R48, R49-R58 (for
3 the limited purpose of identifying them as records that Dr. McGovern reviewed), R59,
4 R61, R63-R64, R66-R69, R74-R75, portions of R76 (pp. 144-148, 162 only), R81, R85,
5 R87-R93, R96, R99, R105, R107, portions of R109 (pp. 3 and 4 only), R110-R111, R113-
6 R114, R116, R117, R120, R126 (for the limited purpose of showing that it was part of the
7 Agency's investigation), R131-R132, R134-R135, R137, R142, R143, R147, R148 (p. 1
8 only), R149-R151 and R156 (for impeachment purposes only).

9 Having fully considered the entire record in this matter, I, Jessica Giannettino
10 Villatoro, Deputy Commissioner of the Bureau of Labor and Industries, hereby make the
11 following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact,
12 Conclusions of Law, Opinion, and Order.²

13 FINDINGS OF FACT – THE MERITS

14 *Description of Respondents*

15 1) At all times material herein, Respondent Frehoo, Inc. ("Frehoo") was an
16 Oregon domestic business corporation. Stars Cabaret and Steakhouse was an assumed
17 business name doing business at 4570 SW Lombard, Ave., Beaverton, Oregon, which
18 was owned and operated by Frehoo.³ Frehoo operated as an adult entertainment club
19 for approximately 20 years until it filed for bankruptcy in the summer of 2016. (Amended
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21 _____
22 ² The Ultimate Findings of Fact required by OAR 839-050-0370(1)(b)(B) are subsumed within the Findings
of Fact – The Merits.

23 ³ Throughout this document, "Frehoo" will be used to refer to both Frehoo, Inc., the corporate entity, and
24 the club called "Stars Cabaret and Steakhouse," which operated in Beaverton, Oregon. References to
"Stars" are meant to refer to all Stars-named clubs, unless otherwise specified.

1 Answer; Ex. A5; Testimony of Kaiser)

2 2) Randy Kaiser, Todd Mitchell and Jeff Struhar all own shares of corporations
3 that have ownership interests in Frehoo. Although some other individuals have ownership
4 interests, Kaiser, Mitchell and Struhar are often referred to as the "owners" of Frehoo by
5 people familiar with the club.⁴ (Amended Answer; Testimony of Kaiser; Hearing Record)

6 3) Kaiser, Mitchell and Struhar have ownership interests in other adult
7 entertainment clubs using the "Stars" business name, including locations in Bend, Salem
8 and Tualatin, Oregon. The other Stars clubs are owned by corporate entities that are
9 separate from Frehoo. Although an owner was assigned primary oversight responsibility
10 for each of the Stars clubs, the three owners also made collective decisions to revise
11 existing policies or adopt new policies at Frehoo. (Ex. A46; Testimony of Kaiser, Colin)

12 4) Mitchell was the owner who provided management oversight of both Frehoo
13 and the Stars club in Tualatin, and is also the corporate secretary for Frehoo. He holds
14 a bachelor's degree in business administration from Temple University. Before he went
15 into business with Kaiser and Struhar, he managed large adult entertainment clubs in
16 Colorado for eight years. During the 2012-2014 time period, Mitchell spent approximately
17 15 hours per week, every other week, on site at Frehoo during the school year. He only
18 spent 5-10 hours per week at the club the other weeks. He spent less time at the club
19 during the summer. He was not involved in hiring the entertainers who performed at the
20 club. (Amended Formal Charges; Amended Answer; Testimony of Colin, Kaiser, Mitchell)

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24 ⁴ Any mention of an "owner" or the "owners" of Frehoo in this Final Order is intended to refer to Kaiser, Mitchell and Struhar, collectively.

1 5) Kaiser performed administrative and accounting functions for Frehoo and
2 other Stars clubs, and also addressed legal issues that arose. He was involved in
3 procuring licenses, such as the liquor licenses with the OLCC. Kaiser is the owner
4 primarily responsible for overseeing the Stars club in Bend, Oregon. After he moved to
5 Bend in 2003, Kaiser did not have management responsibilities for Frehoo. Kaiser was
6 not a corporate officer of Frehoo, but is listed as Frehoo's registered agent. Kaiser was
7 involved with the other owners in making policy decisions, but did not take on the
8 responsibility for putting policies at Frehoo into place. He received questions about the
9 Frehoo club regarding matters such as accounting entries or legal issues. For example,
10 when BOLI's Wage and Hour Division came to Frehoo to conduct an onsite compliance
11 review on October 1, 2014, the manager on duty contacted Kaiser and, at Kaiser's
12 direction, the manager asked the investigators to wait until Kaiser arrived. During the
13 time period from 2012 to 2015, Kaiser was not often present on the premises of Frehoo.
14 He primarily divided his time between the club in Bend and a Stars business office in
15 Tualatin, traveling back and forth between the two locations each week. (Amended
16 Formal Charges; Exs. A46, A52; Testimony of Kaiser, Perez, Colin)

17 6) Struhar was the corporate president of Frehoo. His involvement with
18 Frehoo consisted of addressing technical issues, such the number of tables required by
19 OLCC, remodeling and design work. He was the owner in charge of overseeing the Stars
20 Salem location. Struhar conferred with Kaiser and Mitchell "on some level" about "global
21 policy," but did not play any part in the day-to-day operations of Frehoo. (Testimony of
22 Kaiser, Colin, Struhar)

1 7) Jon Herkenrath started working for Stars in 2010 as a valet. About three
2 months after he was hired, he began performing security duties. He then worked as a
3 part-time or swing shift manager for a period of time. About a year later, in 2012, he
4 became a day manager, serving in that position until 2014. For a period of time, he was
5 moved to the Stars Bridgeport location for about nine months, then returned to Frehoo.
6 In February or March of 2014, Herkenrath was promoted to the position of regional
7 manager. As regional manager, he served as the general manager of both the Beaverton
8 and Bridgeport clubs. He was the regional manager until Frehoo closed in July of 2016.
9 (Testimony of Herkenrath)

10 *Description of Frehoo Club Operations*

11 8) Frehoo was an adult entertainment club that featured female entertainers
12 who performed nude dancing. Alcohol and food were served to the club's customers.
13 The club owners wanted Frehoo to be a premium gentleman's club and attempted to build
14 an "experience" for their patrons. Frehoo sought to attract high-end clientele, such as
15 men with disposable incomes and expense accounts, including CEO's, celebrities,
16 recording artists and professional athletes. Managers greeted customers upon arrival
17 and asked what kind of experience the customers were seeking, which could include
18 things like viewing nude dancers on a stage, watching a dancer who performed with hula
19 hoops, arranging for a private dance, or having an entertainer sit with the customer at a
20 table. (Testimony of Herkenrath, Mitchell, Kaiser)

21 9) The women who danced at Frehoo were viewed as "professional
22 entertainers" in an "erotic" and "sexually charged" business. (Testimony of Kaiser)

1 10) The documents provided to women applying to work as a dancer at the club
2 sometimes described the position as a "dancer" and "entertainer." Dancers/entertainers
3 did the following activities throughout the course of their work:

- 4 • Danced on stage for two songs at a time in a rotation set by the DJ. Dancers were
5 expected to remove the clothing from either their top or bottom by the end of the
6 first song, and had to be fully nude at the conclusion of the second song.
- 7 • Performed private dances for customers in the VIP lounge area while partially nude
8 or topless.
- 9 • If over the age of 21, drank alcoholic drinks, including shots of alcohol, purchased
10 for them by customers.
- 11 • Sat down and conversed with customers.
- 12 • Entertainers could also be "bought off the floor," meaning that a customer would
13 pay for a dancer to be removed from the stage dancing rotation to spend the rest
14 of her shift with the customer.

15 The entertainers who made the most money for the "house" had their own group of
16 customers. Some entertainers used websites, text messages or business cards to
17 provide information to customers about themselves, where they worked and their
18 schedules. (Ex. R64; Testimony of Amy, Herkenrath, Sarah, AP2)

19 11) There was a separate area for "VIP" (private) dances in which a customer
20 could pay to have an entertainer perform a private dance. In the VIP dance area, there
21 were several chairs separated by black sheer curtains. Lighting in the VIP area was
22 dimmer than in the rest of the club. There was a podium next to the entrance of the VIP
23 area where a security person was usually stationed. The charges for VIP dances were
24 posted on a sign outside the VIP area. (Ex. A50, p. 1; Testimony of Herkenrath, AP2)

1 12) Entertainers performed using a "stage name" that was different than their
2 real name. (Exs. R61, R64; Testimony of Colin, Megan, Herkenrath, Sarah, Mitchell,
3 Taylor)

4 13) Frehoo employed a general manager and shift managers. General
5 managers were responsible for everything that happened in the club. All managers
6 carried keys to the club and were told to "operate the club like you own it." Frehoo also
7 employed or engaged the services of security guards, bartenders, waitresses, cooking
8 staff, DJs, and "door girls" who greeted customers upon entry to the club and checked
9 their identification. "Door girls" were not present during all hours that the club was open,
10 but worked during the club's busier times. (Testimony of Tim, Herkenrath)

11 14) Security guards or managers were supposed to walk dancers out to the
12 parking lot at the end of a dancer's shift so that dancers did not leave the club with a
13 customer. (Testimony of Herkenrath)

14 15) The diagram attached to this Final Order as Appendix B accurately depicts
15 the layout of the club. (Exs. A51, A90, A93; Testimony of Herkenrath, Megan)

16 16) Inside the dancer dressing room, there was a door to a small "featured
17 entertainer's room" ("FE room"). The FE room was locked and only the managers had
18 keys to access it. The FE room was used by featured entertainers visiting the club and
19 also when the women came to the club to sell dancer costumes. (Ex. R67; Testimony of
20 Tim; Coni; Leslie)

21 17) Frehoo had a sexual harassment policy posted in the dancer dressing room
22 and in other areas of the club which stated:
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1 "Stars Cabaret
2 "COMPANY POLICY
3 REGARDING
4 SEXUAL HARASSMENT

5 "Stars Cabaret does not tolerate any form of discrimination or harassment of its
6 personnel due to race, color, religion, sex, national origin or marital status.'

7 "If any person feels that he or she is in an uncomfortable position, i.e. having
8 suggestive comments made to he or she [sic], or touched in an unwelcome or in
9 appropriate [sic] manner, that person has an obligation to report such a situation
10 to the owners of the business.

11 "The manner to report such offenses is as follows:

- 12 "1. Write a letter and mail to PO Box 2249, Beaverton, OR 97075
13 "2. Telephone one of the following owners:

- 14 a. Randy Kaiser - XXX-XXX-XXXX
15 b. Todd Mitchell - XXX-XXX-XXXX
16 c. Jeff Struhar - XXX-XXX-XXXX

17 "If you do not have a personal conversation with one of these owners,
18 you should try another until you actually talked with an owner.
19 Please do not leave messages and assume that the problem has
20 been communicated.

- 21 "3. Write a letter or telephone Stars' corporate attorney, Jim Neill, at XXX-
22 XXX-XXXX or c/o Davis Wright Tremaine, * * *, Portland, OR 97201.

23 "If you sincerely want to make Stars a desirable place where we can all be
24 successful, you must take the initiative to ensure we maintain our standards.
Anonymous letters cannot be considered, because if an incident takes place, we,
the owners, must investigate and take appropriate action. This policy applies to
both employees and independent contractor entertainers.

DATE ISSUED: JULY 25, 2002"

(Ex. A6, p. 17 (emphasis in original); Testimony of Kaiser)

18) The "corporate attorney" identified in the sexual harassment policy as a
person to be contacted to report sexual harassment died in 2010. (Testimony of Kaiser)

1 19) Posters with information and warnings about human trafficking were posted
2 in various areas of the club. (Testimony of Herkenrath)

3 21)⁵ Frehoo initially implemented written policies in a handbook in 2003, but the
4 Stars businesses stopped applying those after a period of time. However, the written
5 policies, many of which no longer applied, were still handed out in a packet issued to new
6 dancers in 2014. The club had rules that were sometimes verbally explained to dancers
7 when they were hired. Among other things, the rules prohibited prostitution and the
8 touching of dancers by customers. If a customer touched a dancer, the dancer was
9 expected to give the customer a “friendly warning” to stop. Security guards and managers
10 could intervene if the “no touching” rule was violated. Customers could be “86’d” (banned)
11 from the club for violating the rules. (Ex. R64; Testimony of Kaiser, Herkenrath, Colin)

12 22) A document authenticator is a device that can be used to detect whether a
13 driver’s license or ID is authentic. An authenticator costs about \$2,000. Frehoo did not
14 use a document authenticating device to verify the authenticity of licenses and IDs until
15 November of 2014. Before Frehoo purchased the device, Kaiser was aware that some
16 clubs were using the device. (Ex. A6; Testimony of Kaiser, Colin)

17 23) Prior to late 2014, Frehoo employed entertainers who were minors between
18 the ages of 18 and 21. The OLCC did not permit minors working as entertainers to access
19 certain areas of the club where people were drinking alcohol. In late 2014, Frehoo
20 stopped hiring minor entertainers. (Testimony of Colin; Kaiser; Herkenrath; Ex. A91)

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23 ⁵A Finding of Fact #20 was inadvertently omitted in the original Final Order. This Amended Final Order has
24 kept the original numbering of the Findings of Fact due to the parties’ referencing specific Findings of Fact
in the parties’ exceptions to the Proposed Order.

1 24) On July 7, 2014, an OLCC inspector received a complaint that a minor
2 entertainer was walking around freely throughout Frehoo when she was not performing.
3 On August 19, 2014, undercover OLCC inspectors observed a 19-year-old minor
4 entertainer sit out in the open inside the club for approximately three to four minutes and
5 noticed that she was allowed to be in a prohibited area when she was not performing.
6 The 19-year-old was issued a citation for being a minor in a prohibited area. Frehoo
7 received a notice of warning for allowing a minor entertainer to be in a prohibited area.
8 (Ex. A91; Testimony of Herkenrath)

9 *Prostitution Involving Frehoo's Former Manager, Steve Toth*

10 25) From the first part of 2011 until November 2012, Steve Toth served as the
11 general manager of Frehoo. Prior to that time, he worked for other Stars clubs for a
12 number of years performing management and security duties. After he worked at Frehoo,
13 he was transferred to the Stars Bridgeport location to serve as the general manager.
14 (Testimony of Kaiser)

15 26) Toth was arrested on December 10, 2013. Kaiser first learned of the arrest
16 when he received a morning telephone call from Toth from the Washington County Jail.
17 Toth told Kaiser that he was arrested because he had sex with a woman who had a fake
18 ID. Toth said that the woman came into the club and did not have the right ID. Toth said
19 that he and the woman met again and had sex on the side of the road and in his
20 apartment. Toth also told Kaiser that the police were alleging that there had been sex in
21 the FE room. At the time, Kaiser did not understand that there was a connection between
22 the woman with the fake ID and the allegations of sex in the FE room. Later that day,
23 Kaiser learned more information after receiving a call from a civic business leader and
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1 reading news on the internet. He immediately called Mitchell and Struhar, who were on
2 vacation in Hawaii. Prior to Toth's arrest, Frehoo had not received any complaints that
3 Toth was involved in prostitution. (Testimony of Colin, Kaiser)

4 27) On or about December 11, 2013, a letter was prepared at Kaiser's direction
5 informing Toth that his employment was terminated. (Ex. R63; Testimony of Kaiser)

6 28) Toth later admitted that he arranged for AP1, a 13-year-old girl, to perform
7 sexual acts for Frehoo's customers in exchange for money in the FE room on Frehoo's
8 premises. Herkenrath saw AP1 in the club with Toth. He was comfortable with AP1's
9 presence in the club and assumed that Toth either knew her age or had checked her ID.
10 Toth pled guilty to sodomy in the second degree, sex abuse in the first degree and
11 compelling prostitution based on his conduct with AP1. He also pled guilty to promoting
12 prostitution after he arranged for three dancers to leave Frehoo's premises with
13 customers. He is serving a 15-year prison sentence for those crimes and is required to
14 register as a sex offender for the rest of his life. (Testimony of Toth; Ex. A17)

15 29) Attorneys for Frehoo hired a private investigator to investigate the
16 allegations involving Toth. After receiving information from the investigation, Frehoo
17 concluded that there was not a prostitution problem at the club and there was just "some
18 manager that was off the rails." (Testimony of Kaiser)

19 30) After Toth's misconduct was discovered, Frehoo implemented a policy
20 requiring two managers or employees to examine a new dancer's ID and "sign off" that
21 they had done that so there would be "more than one person's word on that." This new
22 policy was not consistently followed. (Ex. R64; Testimony of Kaiser, Herkenrath)

23 *AP2's Experience at Frehoo*

1 31) AP2 was born in Russia. Her mother adopted her from a Russian
2 orphanage when she was 11 years old and brought her to the United States. It took her
3 approximately three years, until she was 14 years old, to learn the English language. She
4 speaks with a Russian accent. (Ex. A29; Testimony of AP2, Opitz)

5 32) At the time AP2 applied to work at Frehoo, she was 15 years old and had
6 been staying in the apartment of a man named Anthony Curry for several weeks. Before
7 meeting Curry, she had run away from a medical facility and had been living with gang
8 members on the streets of Portland. She met Curry while she was waiting at a bus stop.
9 She had no belongings with her except for the clothes she was wearing and \$80 in her
10 pocket. Curry drove by the bus stop twice and then asked her to get in the car. When
11 AP2 first met Curry, he was nice to her and told her that he knew a lot about business.
12 He said he could show her how to make money, and took her to his apartment. Curry
13 provided AP2 with food, clothing and marijuana. Curry forced her to have sex with him
14 and became angry when she said she did not want to have sex. After she was with Curry
15 for about two weeks, he told her about women who danced in nightclubs to make money.
16 He told her that he respected women who made money and that they were "the real
17 queens." He had been providing AP2 with everything and she felt pressure to make
18 money. Curry trained AP2 to be an exotic dancer and gave AP2 a book that discussed
19 techniques for seducing men. Curry also posted AP2's photo on several websites
20 advertising for "outcall" dates in which a woman meets a man for sexual intercourse at
21 his location, but AP2 did not ever go on an outcall date. (Exs. A29; Testimony of AP2,
22 Opitz)

1 33) Curry purchased a counterfeit Oregon identification card for AP2. An
2 identification card is a “standalone” form of identification, meaning that it is accepted by
3 itself without supporting documentation. The ID card included a date of birth of “12-05-
4 92”⁶ and represented that it was issued on “4-17-2013.” The difference between the date
5 of birth and the issue date is less than 21 years after the date of birth, which indicates
6 that the ID card was made for a person who was under 21 years of age (a minor) on the
7 issue date. AP2’s fake ID card differs from an authentic Oregon identification card issued
8 to minors in the following ways:

- 9 • The photo of AP2 was on the left side of the ID card, but should have been on the
10 right side.
- 11 • There should have been a red border around the photo, but there was not.
- 12 • There should have been language in a red border around the photo stating that
13 she was “under 21 until” followed by the date on which she was to turn 21.
- There was no space after the comma that followed her last name.
- There was no comma between the name of the city and state.
- It lacked a reflective surface that varied in color when viewed from different angles
 or with a black light.

14 At the hearing, Frehoo’s former security guard and manager, Dante, testified that there
15 were “definitely little things” on AP2’s ID that he would have questioned. (Exs. A33A,
16 A34A; Testimony of Colin, AP2, Stewart, Dante)

17 34) The first time AP2 attempted to use the fake ID to enter an adult
18 entertainment club, a bouncer tried to “scan” it and said that it did not “go through”
19 because it was a fake ID. (Testimony of AP2)

20 35) AP2 danced nude at two other adult entertainment clubs before working at
21 Frehoo. She first danced at Jags Clubhouse in North Portland for approximately one
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24 ⁶ This is not the actual date of birth of AP2.

1 week, and then danced at Dolphin II in Beaverton three times. Curry drove her to these
2 clubs for each audition and shift that she worked. AP2 used the fake ID to apply to work
3 at the other clubs. She also used the ID to apply for work at the Sunset Strip club after
4 she stopped working at Frehoo. Curry told AP2 that she should not show the fake ID to
5 anyone unless she was asked because he did not want to risk someone discovering that
6 it was fake. (Testimony of AP2, Opitz)

7 36) AP2 auditioned at Frehoo on August 14, 2014, and was hired to work as a
8 dancer. (Ex. A45; Testimony of Herkenrath)

9 37) Before auditioning, AP2 first called Frehoo to ask about the audition
10 process. When she entered the club, there was no one at the door and she walked over
11 to talk to the bartender. The bartender directed her to a manager named "Jon." She
12 presented herself to the club as an experienced dancer. AP2 changed into dancing
13 clothes in the dancer dressing room and then auditioned on stage. She removed her
14 clothing on both the top and the bottom, and was fully nude at the end of the audition.
15 She understood from Curry and her prior dancing experiences that she had to be fully
16 nude at the end of two songs. Customers left tips for AP2 during her audition. (Testimony
17 of AP2)

18 38) After AP2's audition, another manager (Dave) asked AP2 for her ID and
19 made a copy of it. That was the first time anyone at Frehoo had asked to see her ID.
20 Dave also gave AP2 papers to fill out. He did not review the rules listed in the paperwork
21 with her. She quickly signed the documents. (Ex. R64; Testimony of AP2)

22 39) Aside from the time Manager Dave checked her ID after she auditioned,
23 AP2 was only asked for her ID on two other occasions at Frehoo: (1) when she ordered
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1 a shot of alcohol from a bartender during one of her shifts and (2) once by a manager
2 named Casey. Frehoo's general manager, Herkenrath, never reviewed AP2's ID.
3 (Testimony of AP2, Casey, Herkenrath)

4 40) On the first night that AP2 worked after her audition, a security guard
5 showed her around the club, but did not explain any rules to her. She learned how to
6 perform from Curry and by watching what other dancers did. (Testimony of AP2)

7 41) AP2 performed nude dancing at Frehoo approximately seven times from
8 August 14-22, 2014. She performed using the stage name "Isis." (Ex. A45; Testimony
9 of AP2, Herkenrath)

10 42) During AP2's shifts at Frehoo, she dressed in "stripper clothes" consisting
11 of underwear and a bra, or lingerie. She wore high heels that were almost seven inches
12 tall. Most of AP2's shifts lasted for eight or nine hours. She worked one night for about
13 12 hours when the club was very busy hosting several bachelor parties. She was the last
14 dancer to leave for the night on a couple of occasions. At times, AP2 went to the dressing
15 room to take a breath and rest. (Testimony of AP2)

16 43) AP2 danced nude on stage during each shift she worked at Frehoo. She
17 did not want to be on stage and was uncomfortable. She saw customers looking at her
18 and felt like they were thinking disgusting, sexual things about her. She also saw a "curly
19 haired' manager and a "bald bouncer" watch her dance, which made her feel awkward.
20 She observed other dancers touching their body and bending down to show their "private
21 parts." AP2 imitated some of the things she witnessed the other dancers doing, including
22 touching her breasts, buttocks and the side of her neck when she dances. She had to
23 swallow her pride while doing this and felt that it was really hard. She felt awkward and
24

1 uncomfortable when she made contact with the staff and bartenders. (Testimony of AP2)

2 44) AP2 also performed VIP dances during each shift. Each VIP dance lasted
3 for the length of one song. On a busy night, she performed about 10 VIP dances, and
4 about five or six VIP dances on a slower night. She made more money if she performed
5 more VIP dances. (Testimony of AP2)

6 45) The men who paid AP2 to perform VIP dances were bigger and older than
7 her, and were consuming alcohol. Some customers touched her and tried to get her to
8 sit on their laps. Some tried to get their hands inside her underwear and tried to get her
9 to touch them inside of their pants. She tried to stop the men from doing these things by
10 telling them that it is not allowed and to let her just do her dance. It was hardest to deal
11 with "drunk" or "tipsy" customers. She felt disgusted during the VIP dances, and had to
12 ignore her feelings to get through the dances. In spite of the conduct she experienced
13 during VIP dances, she felt that the VIP dances were better than dancing on stage
14 because she did not have to be nude and take her clothes off in front of so many people.
15 (Testimony of AP2)

16 46) AP2 "smoked weed" (marijuana) before each shift she worked at Frehoo to
17 help her get through the experience. (Testimony of AP2)

18 47) During her shifts, AP2 also "worked the floor" in the main table area by
19 meeting with customers to get them to buy her a drink and to get them to pay for a VIP
20 dance. One customer, a man in his 60's, gave her \$50 to sit on his lap. She did this for
21 about one minute and was uncomfortable. She told him, "No, let me just sit next to you."
22 On different occasions, this same man gave her money for just being close to him. When
23 she received tips while working on the floor, she put the money in her bra or underwear.
24

1 (Testimony of AP2)

2 48) AP2 worked one busy evening when Frehoo hosted bachelor parties.
3 During a bachelor party, she saw lots of money "flying everywhere," lots of drunk people
4 and lots of dancers who ordered drinks, danced, and were "going crazy." She felt that
5 about half of the men were drunk and did not know how much they were spending. Each
6 bachelor would sit in a chair on stage. Four or five entertainers danced closed to the
7 bachelor, pulled his necktie, hugged him, rubbed his hair, and had him put money inside
8 their clothing. AP2 did not participate in the dances with bachelors and did not want to
9 be there. (Testimony of AP2)

10 49) Working at Frehoo was a challenge for AP2. She knew that she had to be
11 nude and act seductive in front of random people, including "creepy people" who she felt
12 violated her rights and grabbed her. When she was under the influence of marijuana or
13 alcohol, it was easier to push aside her emotions. She felt like a "sex robot" doing favors
14 and dances. She swallowed her pride. (Testimony of AP2)

15 50) Curry picked up and dropped off AP2 in his car in the Frehoo parking lot
16 each time that she worked. Curry told AP2 that she was at the club to make money, and
17 that she should keep to herself and not socialize. He told her to focus on the customers
18 and make money. He told her that she should make \$800-900 per night. She came close
19 to that number, but was not ever able to make that much money. AP2 put the money she
20 made at Frehoo in a wallet. When she got back to Curry's apartment, he told her that he
21 would hold the money for her. (Testimony of AP2)

22 51) AP2 believed that performing at Frehoo was something she was required
23 to do to please Curry. She hated it, but thought it was the only way to please Curry. She
24

1 walked out the apartment door many times to try to leave Curry. She wanted to call her
2 mother but did not know how to start the conversation. When she tried to leave, Curry
3 followed her out the door and convinced her to stay. He told her that everything would
4 be okay and that she could make it through it. (Testimony of AP2)

5 52) AP2 did not complain about the conduct she experienced at Frehoo
6 because she did not believe it would help. She did not call for security to help her during
7 the VIP dances because she thought she would not be asked to perform VIP dances if
8 she complained. (Testimony of AP2)

9 *Discovery that AP2 was a Missing Child*

10 53) Shortly after AP2 began working at Frehoo, a bartender named Amy noticed
11 a missing child posting on Facebook. Amy recognized the missing child as the dancer
12 "Isis" and felt sick to her stomach. When Amy came into work that day, she immediately
13 showed the Facebook posting to her manager, Dave, and to Melanie, who agreed that
14 the missing child was Isis. Amy also called Mitchell. (Testimony of Amy)

15 54) Mitchell called Herkenrath and asked him to confirm whether the missing
16 child on the website worked at Frehoo, and Herkenrath confirmed that she did. Mitchell
17 instructed Herkenrath to call Det. Opitz. (Testimony of Mitchell)

18 55) Det. Opitz received a call from Herkenrath on August 25, 2014. Herkenrath
19 told him that a missing child on a website was "possibly dancing" at the club. Herkenrath
20 directed Opitz to the missing child website, and Opitz noted that there was a 15-year-old
21 girl missing from the Portland area. Opitz asked Herkenrath for a copy of the photograph
22 of AP2's ID and he picked up copies of AP2's paperwork from the club on August 26,
23 2014. (Testimony of Opitz)

1
2 56) Det. Opitz attempted to contact AP2 on her cell phone. He connected with
3 her on August 30, 2014, pretended to be a manager at Frehoo and asked her to come in
4 to work a shift. (Testimony of Opitz)

5 57) AP2 stopped performing at Frehoo after she started receiving the messages
6 from Det. Opitz asking her to come into work. Curry thought the messages were weird
7 and accused AP2 of having sex with the men at the club. He told her she was not going
8 to go back there. AP2 later learned the text messages were from Det. Opitz. (Testimony
9 of AP2)

10 58) On September 5, 2014, Det. Opitz spoke to Tony from the Sunset Strip,
11 another adult entertainment club in the Beaverton area. Tony told Det. Opitz that a dancer
12 named Isis had auditioned and would be back the next day. (Testimony of Opitz)

13 59) On September 6, 2014, Det. Opitz and other Beaverton police detectives
14 arrested Curry as he was dropping off AP2 at Sunset Strip. AP2 was later reunited with
15 her mother. (Testimony of Opitz, AP2)

16 60) After AP2 was back at home with her mother, she was ashamed to tell her
17 mother that she had danced nude in front of customers. She still has dreams and
18 flashbacks about taking her clothes off and being nude, and having customers touch her.
19 AP2 finds it hard to live life as a regular teenager. She does not feel like she can go on
20 normal dates with boys and often wonders if they want to "grab" her and take advantage
21 of her. She finds it hard to build relationships with people. (Testimony of AP2)
22
23
24

1 *Stars' Involvement with the COAST organization*

2 61) Sex trafficking⁷ is a growing problem in the United States. (Testimony of
3 Spencer)

4 62) Club Operators Against Sex Trafficking ("COAST") was established in 2010.
5 COAST is an umbrella organization of ACE National, a trade organization for the adult
6 entertainment club industry. COAST arranges for programs throughout the country that
7 provide training by federal agents on how to recognize indicators of sex trafficking. The
8 trainings include discussions of what constitutes human trafficking under federal law.
9 With respect to minors under the age of 18, there does not need to be proof of force, fraud
10 or coercion. The trainings also address the differences between real and fake IDs.
11 (Testimony of Spencer)

12 63) Struhar was contacted by a co-founder of COAST in August of 2013. After
13 some conversations and meetings, Kaiser contacted Angelina Spencer, one of the co-
14 founders of COAST, on September 6, 2013, and told her that he was interested in having
15 a COAST training in the Portland area. Kaiser and Spencer communicated more than a
16 dozen times after that to attempt to set up a COAST program in Portland. There were
17 some delays in the process when a federal agent in Portland moved office buildings and
18 due to federal worker furloughs during a government shutdown, as well as due to the
19 discovery of AP2 in Frehoo. The first training was held in Portland in October of 2014.
20 Kaiser paid the expenses for the training. Stars and other clubs were represented at the

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22
23 ⁷ The forum takes official notice under OAR 839-050-0320 that, among other things, sex trafficking involves
24 the illegal sexual exploitation of another person for financial purposes. See, e.g. ORS 163.266 (describing
the crime of "trafficking in persons"); see also Black's Law Dictionary 1126 (10th ed. 2014) (defining "human
trafficking")

1 meeting. A second COAST training was held in Portland in October of 2015. At the time
2 of the hearing, Kaiser and Spencer were in the process of scheduling another Portland
3 event.

4 In an email dated December 12, 2013, discussing Toth's arrest, Spencer asked
5 Kaiser "what type of age verification procedures did you have in place?" Kaiser did not
6 answer this question when he responded to the email. In an email from Spencer dated
7 September 10, 2014, following the discovery of AP2, Spencer suggested that Frehoo
8 "move forward * * * with age verification in your clubs * * * and work toward cleaning up
9 this mess with a good plan." (Ex. A75; Testimony of Kaiser; Spencer)

10 *Credibility Findings*⁸

11 64) AP2 was generally a credible witness. She was attentive when listening to
12 questions and was forthcoming about the difficulties she has encountered in her life, as
13 well as emotionally difficult situations she experienced before and after working at Frehoo.
14 Aside from appearing nervous at times, her demeanor did not change significantly when
15 she was cross examined by Respondents' counsel.

16 On one occasion, AP2's testimony at hearing differed from her signed and sworn
17 written interrogatory answers in that her interrogatory responses stated that a bouncer
18 intervened or stepped in when a customer touched her inappropriately, but she testified
19 at hearing that no one assisted her. She explained her different answers by stating that

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22 ⁸ The forum notes that witnesses testified that rumors "fly pretty fast" through the workplace. *See, e.g.*
23 Testimony of Brittany. The forum has given little weight to testimony about rumors and events that were
24 not directly witnessed, and instead bases the conclusions in this Final Order on the testimony of credible
eyewitnesses. Additionally, credibility findings were not made for witnesses whose testimony related
primarily to the claims of AP1 and that the ALJ determined was inadmissible or unnecessary for purposes
of the claims regarding AP2.

1 she was given many papers to sign and did not read them closely enough before she
2 signed them. Accordingly, the forum did not credit her testimony on this issue. To the
3 extent AP2's testimony was slightly different than interview summaries prepared by
4 detectives or investigators, the forum noted that she did not prepare the summaries, nor
5 did she review and approve the contents of those summaries. The forum also did not find
6 significant discrepancies as to relevant issues of fact when comparing AP2's hearing
7 testimony with the interview summaries prepared by detectives or investigators.
8 (Testimony of AP2; Exs. R25, R29)

9 65) The forum found the following witnesses to be credible: Perez (BOLI Wage
10 and Hour Compliance Specialist), Colin (BOLI Civil Rights Investigator⁹), Herring
11 (Beaverton police detective), Lynch (Portland Operations Manager for BOLI's Civil Rights
12 Division), Brown (Beaverton police detective), Ponaman (Intake Manager for BOLI's Civil
13 Rights Division), Karen (Frehoo cocktail waitress), Coni (former owner of costume
14 business), Leslie (owner of costume business), Taylor (dancer), and Struhar (Frehoo
15 owner). However, numerous witnesses testified that they did not think it was possible
16 that criminal activities could have occurred on the premises. This testimony was credited
17 as opinion testimony and was considered by the forum. However, the opinion testimony
18 was often outweighed by credible testimony from witnesses who observed or experienced
19 the criminal conduct. For example, testimony from witnesses who did not believe
20 prostitution could have taken place in the FE room was outweighed by credible evidence
21 that it in fact occurred. (Testimony of Opitz, AP1, Toth)

22 _____
23 ⁹ Colin has also served in other positions for BOLI, including work as a Training Development Specialist
24 and in an out-of-class assignment as an Administrative Prosecutor. His work on this case was primarily in
the capacity of his role as a Civil Rights Investigator.

1 66) Steve Toth's admission that he arranged for AP1 to engage in prostitution
2 activities out of Frehoo's FE room was credible because it was consistent with AP1's
3 credible testimony and resulted in his felony convictions. Additionally, his testimony about
4 how Frehoo's business generally operated and the fee structure was consistent with that
5 of other credible witnesses. However, in almost all other respects, Toth was not a credible
6 witness because he showed strong personal bias against Frehoo and its owners. Toth
7 also admitted that he attempted to obtain money from Frehoo in exchange for an
8 agreement to not communicate with BOLI. Accordingly, his testimony was not given any
9 weight whenever it conflicted with credible evidence. (Ex. R99, Testimony of Toth)

10 67) Witness Ashley testified by telephone on behalf of the Agency. Beginning
11 in 2012, she worked at Stars as a dancer on two different occasions. Ashley had an
12 obvious bias against Frehoo because she was terminated by Jon Herkenrath.
13 Additionally, the details in her testimony (such as mentioning a manager named "Jay")
14 were at odds with information provided by other credible witnesses. As well, she testified
15 about a woman who danced with the name of "Jazmyn" before AP1 worked there and
16 used the name "Jazmyn." Accordingly, it is not clear which performer named "Jazmyn"
17 Ashley was describing in her testimony. Based on the inconsistencies between the
18 testimony of Ashley when compared to testimony from more credible witnesses, the forum
19 concludes that her testimony had little evidentiary value. (Testimony of Ashley)

20 68) The forum did not find Melanie to be a credible witness in light of other
21 credible testimony and evidence that Melanie was not honest or truthful. (Ex. R147;
22 Testimony of Taylor)

1 69) Davey was generally a credible witness in describing the layout and
2 atmosphere of the club, and was candid about admitting some of his personal struggles.
3 However, his testimony that one of the dancers was a prostitute was not credited because
4 he did not actually observe prostitution activities and instead based his statements on
5 rumors he heard from others. (Testimony of Davey)

6 70) Bartender Amy's testimony describing the layout of the club, about finding
7 a missing child posting on Facebook and about notifying Dave and Todd Mitchell was
8 credible. (Testimony of Amy)

9 71) The testimony of Det. Opitz was credible and the forum has credited his
10 testimony in its entirety, except for his testimony about the thinness/thickness of AP2's
11 fake ID that differed from his testimony at Curry's criminal trial. (Testimony of Opitz)

12 72) Casey was generally credible, but he had a tendency to exaggerate details
13 in favor of Respondents. At the time of the hearing, he was employed at the Stars'
14 Bridgeport location. His testimony sounded rehearsed and suggested a natural bias in
15 favor of Respondents. On direct examination by Respondents' counsel, Casey acted with
16 confidence and certainty when he testified that AP2's fake ID looked "real." He further
17 stated that he was familiar with various forms of identification and could remember what
18 the ID's of "all the girls" looked like. However, on cross examination, his demeanor
19 changed and he could not recall details regarding various dancer ID's. He also could not
20 recall the hair color of one of the regular dancers and did not remember whether AP2
21 spoke with an accent. Accordingly, the forum did not credit his testimony that AP2's
22 identification appeared to be "real." (Testimony of Casey)

1 73) AP1 credibly testified about the layout of the club and that Toth arranged
2 for her to engage in prostitution in the FE room.¹⁰ (Testimony of AP1)

3 74) Tammy credibly testified that she had never been in a romantic relationship
4 with Kaiser and that he had never waived dance fees on her behalf. (Testimony of
5 Tammy)

6 75) Herkenrath was not a credible witness for several reasons. He frequently
7 left out information or shaded the facts to make himself appear in a better light. Although
8 he appeared comfortable and friendly when questioned by Respondents' attorney, he
9 fidgeted during cross examination when confronted with questions that exposed the
10 inconsistencies in his testimony and prior statements.

11 Respondents attempted to portray Herkenrath as a hero for discovering that AP2
12 was a missing child and reporting this to police. However, Amy, a bartender, was the
13 person who actually noticed a missing child post about AP2 on Facebook and brought it
14 to Herkenrath's attention. Herkenrath only called the police after discussing it with
15 another manager and Mitchell.

16 Additionally, Herkenrath was not forthcoming and cooperative with the Beaverton
17 police investigating the sex trafficking of AP1 and AP2. Although he claimed that he told
18 an officer that he had seen AP1 at the club, there was no evidence that any officer was
19 aware of that fact and that was a significant fact that an officer would have noted. Det.
20 Opitz testified that this information would have been helpful at the criminal trial of Moreno-
21 Hernandez regarding the prostitution of AP1 on Frehoo's premises. When asked by BOLI

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23 ¹⁰ It was not necessary to evaluate the remainder of AP1's testimony for credibility purposes as the claims
24 involving her resolved after the hearing concluded. See Procedural Finding of Fact #69.

1 investigators if he had ever seen AP1 in the club, instead of simply answering "yes,"
2 Herkenrath responded that he had not seen her "in a working capacity." Although
3 Herkenrath confirmed that AP2 had worked at Frehoo when he spoke to Mitchell, he told
4 Det. Opitz that a missing child was "possibly" working there. When Det. Opitz asked for
5 the club's video surveillance which might show AP2's presence at the club, Herkenrath
6 provided a grainy and blurry photograph instead of the actual video footage to the police.
7 At hearing, he testified that he was not asked for video. However, it is illogical that he
8 would not have understood that the actual video footage would have been more useful to
9 a police investigation than the poor quality photograph he provided to the police.

10 Herkenrath also claimed that AP2 looked and acted like an adult when she
11 auditioned and worked at the club, but he referred to her as a "little girl."

12 Furthermore, Herkenrath exaggerated when describing the club's enforcement of
13 rules, describing rules as "black and white" and saying that there was "zero tolerance" for
14 prostitution. In contrast, numerous witnesses described that warnings were given to
15 customers who broke club rules, instead of removing them from the club. Customer
16 Wheeler was allowed to return after he had been 86'd (banned from the club). As well, a
17 dancer was rehired after being fired for potential prostitution activities. Finally, Toth was
18 not fired by Mitchell when he allowed an employee to leave with a customer, Wheeler.
19 Contrary to Herkenrath's testimony, credible evidence demonstrated that the rules at the
20 club were not strictly enforced. In conclusion, the forum has given no weight to
21 Herkenrath's testimony except when it was corroborated by other credible evidence.

22 (Testimony of Herkenrath, Amy, Opitz, Mitchell, Jennifer)

1 76) Dante (former security guard and manager) credibly testified about how the
2 club generally operated during his employment (early 2013-July 2014) and as to what the
3 rules were when he worked there. He also testified credibly after reviewing a copy of
4 AP2's ID that there were "definitely little things" on the ID that he would have "been
5 questioning." (Testimony of Dante)

6 77) Ursula, a bartender at Frehoo, was generally credible when describing the
7 club's operations and atmosphere, and that portion of her testimony was credited by the
8 forum. However, with respect to Ursula's testimony that AP2 appeared to be older, the
9 forum finds Ursula had an incentive to say that because she has an OLCC license and
10 served AP2 a shot of alcohol. Additionally, Ursula had a personal bias in favor of Frehoo
11 in that she described the owners and employees as being like a "family" to her.
12 (Testimony of Ursula)

13 78) James Marquardt, a former OLCC employee, was called by Respondent to
14 testify regarding his experience reviewing ID's for OLCC and to discuss the training he
15 provided to OLCC permittees.

16 His testimony addressed the standards used for checking ID's to ensure that
17 alcohol was not served to minors. However, his testimony did not establish that he had
18 expertise as to the standard for checking IDs in the adult entertainment business to
19 protect minors from sex trafficking and sex abuse. Also, the OLCC does not have
20 authority over whether a business may hire a minor. Rather, the OLCC is responsible for
21 determining if minors working in establishments are confined to the separate areas that
22 minors are permitted to be in.

1 Additionally, Marquardt was hired by Respondents to testify on their behalf, giving
2 him an inherent bias to provide testimony that supported their case. His expertise was
3 further called into question when he could not articulate what to look for to determine if
4 an ID was forged during his cross examination. Based on the foregoing reasons, his
5 testimony was not credited when it conflicted with more credible evidence. (Testimony of
6 Marquardt)

7 79) The testimony of Megan was credible as to the general operations of the
8 club, but she did not have specific knowledge of what AP2 actually experienced.
9 (Testimony of Megan; Ex. R13)

10 80) Moses testified credibly as to how the club generally operated and what he
11 personally observed and witnessed. (Testimony of Moses; Ex. R90)

12 81) Mangrum, a private investigator hired by Frehoo, was generally a credible
13 witness, although he was unable to recall some details about the prostitution "stings" he
14 conducted. (Testimony of Mangrum)

15 82) Belen, a bartender, was a credible witness, but she worked from 2010 to
16 2013, so would not have had the opportunity to observe the club's operations during the
17 time AP2 worked there. (Testimony of Belen)

18 83) Spencer is the founder of COAST who interacted with Kaiser to arrange
19 Portland trainings on the topic of sex trafficking. She had an obvious bias in that her goal
20 was to promote a positive image of the adult entertainment industry and to promote the
21 work of COAST as an organization. However, the forum finds that she credibly described
22 her communications with Kaiser to arrange COAST trainings. (Testimony of Spencer)

1 84) Dancer Sarah was generally a credible witness as to the atmosphere and
2 environment at Frehoo. However, throughout her testimony she added unsolicited
3 editorial comments to make a point that she was proud of working for Frehoo and wanted
4 to show that she performed honorable work. Her unprompted interjections demonstrated
5 an inherent bias in favor of Frehoo. Accordingly, those comments were not credited by
6 the forum. (Testimony of Sarah)

7 85) Brittany worked as a dancer and door girl for Frehoo in 2012. Accordingly,
8 she did not have an opportunity to observe the conditions in the workplace when AP2
9 worked there. Brittany's testimony was not credited when it conflicted with credible
10 evidence relevant to the time period that AP2 performed at Frehoo. (Testimony of
11 Brittany)

12 86) Hal was a manager at Frehoo during 2011 and 2012. Because Hal did not
13 have an opportunity to observe the conditions in the workplace when AP2 worked there,
14 his testimony was not credited when it conflicted with credible evidence relevant to the
15 time period that AP2 performed at Frehoo. (Testimony of Hal)

16 87) Bob Stewart credibly testified as to what he observed when he reviewed
17 AP2's ID on behalf of Respondents in that his testimony was generally consistent with the
18 observations of Colin, who reviewed the ID on behalf of the Agency. However, Stewart
19 was treated as a fact witness, not as an expert witness. (Testimony of Stewart)

20 88) Manager Tim testified that dancers "routinely" received hiring paperwork
21 that they completely filled out, signed and dated. However, this testimony conflicted with
22 hiring documents that were incomplete and unsigned. Tim also claimed that the written
23 rules were consistently enforced but that testimony conflicted with the testimony of other
24

1 witnesses. In particular, Kaiser testified that many of the written rules were out of date
2 and not enforced. (Testimony of Lynch, Tim, Kaiser)

3 89) Both the Agency and Respondents offered expert witnesses on the extent
4 of the harm suffered by AP2. Neither of those witnesses had full access to information
5 that would be relevant to rendering a credible opinion. The Agency's expert, Dr. Jon
6 Conte, had not been provided with documents that he said, "could be useful," including
7 sworn testimony from the criminal trial and the summaries of BOLI interviews.
8 Respondents' expert, Dr. Kevin McGovern, conducted a more comprehensive document
9 review, but did not have an opportunity to speak with AP2 personally. Given that each
10 expert lacked access to information that they agreed could be useful, their testimony had
11 little evidentiary value and was given minimal weight by the forum. (Testimony of Conte,
12 McGovern)

13 90) Randy Kaiser was a credible witness except in two respects.

14 First, Kaiser's expressions of concern for the welfare of sex trafficking victims by
15 referencing club policies and his involvement with COAST training was undercut by his
16 statement that he would "think twice" before reporting that there was a minor in the club
17 to the police. His credibility on this issue was further weakened when he said that
18 "reporting comes at a price" and that Frehoo was a "victim of a fraud."

19 Second, Kaiser's testimony that he "never thought or even dreamed that there
20 could be a problem of prostitution" at Frehoo was inconsistent with the fact that he had
21 arranged for private investigators to conduct undercover "stings" to determine if
22 prostitution was occurring at the club. There were also posters on the wall throughout
23 Frehoo discussing the topics of human trafficking and prostitution, which also suggests
24

1 at least some awareness of the possibility that these activities could occur in the club.

2 (Testimony of Kaiser, Herkenrath)

3 91) Todd Mitchell was credible except in his insistence that Toth did not engage
4 AP1 in prostitution activities at Frehoo. The forum did not believe this testimony because
5 of Mitchell's awareness of the evidence to the contrary, including Toth's criminal
6 conviction for committing this conduct. (Testimony of Mitchell, Toth)

7 92) Witness Jennifer (dancer name Tru) was not a credible witness. At the
8 hearing, she contradicted prior statements she made to Det. Opitz regarding a dancer
9 named Jewell and sexual acts she claimed to have witnessed other dancers performing
10 in exchange for money. Additionally, with respect to the incident when Jennifer left
11 Frehoo's premises with Wheeler, every witness described the incident differently. The
12 forum concludes that there is no credible version of what actually occurred with the
13 exception of the following facts which are generally agreed upon by all witnesses to the
14 incident:

- 15 • One evening, Jennifer left Frehoo with Wheeler before the end of her scheduled
16 shift as a "door girl."
- 17 • Toth was aware of this, and permitted Jennifer to leave with Wheeler.
- 18 • The incident occurred during the time when Toth worked as the general manager
19 at Frehoo.
- 20 • Immediately after the incident, Jennifer told Mitchell that after she left the club with
21 Wheeler, Wheeler "whipped out his penis and asked for oral sex."
- 22 • Wheeler was "86'd" (banned) from Frehoo and could not come to the club for a
23 period of time.
- 24 • Although Toth allowed Jennifer to leave with a customer before her shift ended,
Mitchell did not terminate his employment. Instead, Toth was transferred to a
management shift at the Stars Bridgeport location.

22 (Testimony of Jennifer, Opitz, Mitchell, Toth)

23 93) Witness Tony is the kitchen/daytime manager at the Sunset Strip club. He
24 testified that he accepted AP2's fake identification at the Sunset Strip and also asserted

1 that he overheard a police officer say that AP2's ID was "one of the best" fake ID's he had
2 ever seen. However, Tony struggled to recall his interaction with AP2 and could not
3 provide any identifying information about the police officer who allegedly commented
4 about the ID. Additionally, while testifying, he did not appear to be paying attention or
5 listening carefully to the questions. Accordingly, his testimony had only minimal
6 evidentiary value and has been given little weight compared to the testimony of more
7 credible witnesses.

8 94) The Agency attempted to introduce into evidence the audio recording of
9 BOLI's interview of Nathan Wheeler, a frequent customer of Frehoo and the owner of
10 another adult entertainment club in the Portland area. The ALJ listened to a substantial
11 portion of the audio of the recording and determined that Wheeler was not credible for
12 several reasons. First, the tone of Wheeler's voice and his demeanor (including the liberal
13 use of profanity and laughter) appeared to be more akin to bragging and exaggeration of
14 his sexual exploitations, rather than someone who seriously listened to the investigators'
15 questions and attempted to answer honestly. Second, his statements concerning the
16 circumstances of him leaving Stars with dancer "Tru" contradicted the statements of other
17 witnesses. Third, he said that he had a hangover on the day he was interviewed. Fourth,
18 he had been 86'd (banned) from Frehoo by Mitchell, giving him an inherent bias against
19 Frehoo and Mitchell. Finally, Respondents' counsel was unable to cross examine him
20 because he did not appear to testify at the hearing. Any statements made by Wheeler
21 were not credited unless they were consistent with other credible evidence. (Ex. A28;
22 Testimony of Mitchell)

CONCLUSIONS OF LAW

1) At all times material herein, Frehoo was an "employer" as defined in ORS 659A.001(4).

2) At all times material herein, Frehoo, Herkenrath, and Mitchell were individuals and "person[s]" under ORS 659A.001(9)(a) and ORS 659A.030(1)(g).

3) Frehoo subjected AP2 to sexual harassment in violation of ORS 659A.030(1)(b), OAR 839-005-0021, OAR 839-005-0030(1)(a)(A), OAR 839-005-0030(1)(b) and OAR 839-005-0030(7).

4) Herkenrath and Mitchell aided and abetted Frehoo in this unlawful employment practice in violation of ORS 659A.030(1)(g).

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

6) Pursuant to ORS 659A.850 and ORS 659A.855, the Deputy Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to issue an appropriate cease and desist order. The orders to cease and desist continuing to violate laws pertaining to discrimination because of sex and sexual harassment in the workplace are an appropriate exercise of that authority. Additionally, the Deputy Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to award compensatory damages to the aggrieved persons resulting from Respondents' unlawful practices. The sum of money awarded assessed against Respondents in the Order below is an appropriate exercise of that authority.

OPINION

INTRODUCTION

Frehoo hired a 15-year-old girl to perform sexually suggestive nude dances to entertain its customers – conduct that she was legally incapable of consenting to under Oregon law. Frehoo attempts to avoid liability by arguing that AP2 deceived Respondents and that Frehoo was the “victim of a fraud.” However, AP2 was the victim, not Frehoo. When AP2 walked into Frehoo, she was a child under pressure from Curry, a sex trafficker, to perform nude dances at adult clubs and make money. Frehoo created a sexually charged entertainment business and its owners were aware of the potential for sex trafficking in adult clubs, yet they failed to employ basic measures to ensure that only consenting adults were hired as dancers.

In its Amended Formal Charges, the Agency alleges that AP2 was subjected to sexual harassment in violation of ORS 659A.030(1)(b), OAR 839-005-0030(1)(a), and OAR 839-005-0030(1)(b). The Agency further alleges that Respondents Colburn, Heinzman-Myers, Herkenrath, Kaiser, Mitchell and Struhar committed unlawful employment practices in violation of ORS 659A.030(1)(g) by aiding and abetting Frehoo in the commission of all unlawful employment practices found herein.

SEXUAL HARASSMENT

OAR 839-005-0030(1)(b) defines hostile work environment sexual harassment as:

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

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

Based on the above, the Agency’s prima facie case in a hostile environment case consists of the following elements: (1) Frehoo was an employer subject to ORS 659A.001

1 to 659A.030; (2) Frehoo employed AP2; (3) AP2 is a member of a protected class (sex);
2 (4) AP2 was subjected to unwanted conduct because of her sex; (5) the unwelcome
3 conduct was sufficiently severe or pervasive to have the purpose or effect of
4 unreasonably interfering with AP2's work performance or creating a hostile, intimidating
5 or offensive work environment for AP2; and (6) AP2 was harmed by the unwelcome
6 conduct. See, e.g., *In the Matter of Charles Edward Minor*, 31 BOLI 88, 100 (2010).

7 *Employment Status of AP2*

8 Frehoo admits that it is an employer. For purposes of this case, Respondents do
9 not dispute that AP2 was employed by Frehoo as a dancer. (Ex. X93)

10 *Because of Sex*

11 Frehoo hires women to perform sexually charged nude dances for male
12 customers. The conduct AP2 experienced was because of her sex (female).

13 *Unwelcome Conduct*

14 AP2 was a minor at the time she performed at Frehoo. Under Oregon law, a
15 person under the age of 18 is "incapable of consenting to a sexual act." ORS
16 163.315(1)(a). Also, it is illegal to use a person who is less than 18 years of age in a
17 display of sexually explicit conduct. ORS 163.670(1); 163.665(1). The definition of
18 "sexually explicit conduct" includes "actual or simulated * * * [l]ewd exhibit of sexual or
19 other intimate parts." ORS 163.665 (3)(f). Oregon also prohibits exhibiting an obscene
20 performance to a minor. ORS 167.075(1). Therefore, as a matter of law, AP2 was
21 incapable of consenting to the sexual acts and exotic dancing she performed for Frehoo's
22 customers. Furthermore, AP2 credibly testified that this conduct was unwelcome. (See
23 Findings of Fact – The Merits, ##43, 45-49) Accordingly, the Agency sustained its burden
24

1 of proving that the conduct was unwelcome.

2 *Sufficiently Severe or Pervasive*

3 The standard for determining whether harassment based on an individual's sex is
4 sufficiently severe or pervasive to create a hostile, intimidating or offensive working
5 environment is "whether a reasonable person in the circumstances of the complaining
6 individual would so perceive it." OAR 839-005-0030(2); *In the Matter of Columbia*
7 *Components, Inc.*, 32 BOLI 257, 276 (2013). Under this standard, the forum examines
8 the conduct AP2 experienced from the perspective of a reasonable 15-year-old girl in
9 those circumstances. The forum concludes that a reasonable young woman of that age
10 would have found the performance of nude dancing for older men to be sufficiently severe
11 to create a hostile, intimidating and offensive working environment, and AP2 credibly
12 testified that she perceived it in that manner. In particular, she credibly testified about the
13 hostility and intimidation she experienced when she had to perform nude on stage and
14 during private dances for men. She also explained how she was intimidated, humiliated
15 and demeaned when the men touched her without her consent during private dances.

16 *Harm to AP2*

17 As described in greater detail below, AP2 was harmed by the harassment she
18 experienced at Frehoo. AP2 suffered mental and physical suffering the entire time she
19 worked there, and her life continues to be impacted by the harassment she experienced
20 at Frehoo.

21 *Conclusion*

22 The Agency has proved all of the elements of a prima facie case for a hostile work
23 environment sexual harassment case.
24

1 **LIABILITY OF FREHOO FOR HARASSMENT OF AP2**

2 The Agency contends that Frehoo is liable for the sexual harassment of AP2 under
3 OAR 839-005-0030(5) (harassment by supervisor, no tangible employment action) and
4 OAR 839-005-0030(7) (harassment by non-employees).¹¹ The forum analyzes each of
5 those theories of liability below.¹²

6 **A. Harassment by Non-Employees**

7 Under Frehoo's business model, female dancers such as AP2 performed sexually
8 suggestive nude dances for the entertainment of its customers. Frehoo is liable for the
9 sexual harassment committed by non-employees if Frehoo or one of its agents "knew or
10 should have known of the conduct unless [Frehoo] took immediate and appropriate
11 corrective action. In reviewing such cases the [forum] will consider the extent of the
12 employer's control and any legal responsibility the employer may have with respect to the
13 conduct of such non-employees." OAR 839-005-0030(7).

14 *Knew or Should Have Known*

15 As indicated above, Frehoo earned revenue by hiring female entertainers who
16 agreed to engage in conduct of a sexual nature. Due to AP2's age and her inability to
17 consent, this conduct was unwelcome. Therefore, the key inquiry for this portion of the
18 analysis is whether Frehoo "knew or should have known" she was only 15 years old and,
19 thus, lacked the ability to consent. There was no evidence that anyone at Frehoo actually
20

21
22 ¹¹ See Procedural Finding of Fact # 63.

23 ¹² In the Proposed Order, the ALJ concluded that Respondents did not violate OAR 839-005-0030(5). For
24 the reasons set forth below, this Final Order reverses that decision. Since the ALJ's analysis of OAR 839-
005-0030(7) was extensive and includes some of the same elements as a claim for OAR 839-005-0030(5),
the claim under OAR 839-005-0030(7) will be addressed first to avoid unnecessary repetition.

1 "knew" that AP2 was underage until the bartender, Amy, showed the missing child
2 Facebook posting with AP2's picture to Herkenrath. Therefore, Frehoo was not aware
3 that the nude dancing and other sexual conduct she experienced from customers was
4 "unwelcome." Accordingly, the forum must determine if Frehoo "should have known" that
5 it was employing a 15 year old girl to dance nude on stage and perform sexually
6 suggestive private dances for male customers.

7 "Should have known" includes 'constructive knowledge' and 'constructive notice.'
8 *Murrayhill Thriftway, Inc.*, 20 BOLI at 153 n.13. These terms were defined by the forum
9 in *In the Matter of Wing Fong*, 16 BOLI 280, 292 (1998). "Constructive knowledge" was
10 defined as "if one by exercise of reasonable care would have known a fact, he is deemed
11 to have had constructive knowledge of such a fact; e.g. matters of public record." *Id.*
12 (quoting Black's Law Dictionary 314 (6th ed. 1990)). "Constructive notice" was defined
13 as:

14 "Such notice as is implied or imputed by law * * *. Notice with which a person is
15 charged by reason of the notorious nature of the thing to be noticed, as contrasted
16 with actual notice of such thing. That which the law regards as sufficient to give
17 notice and is regarded as a substitute for actual notice."

18 *Id.* The forum further stated that an employer is liable when "upon reasonably diligent
19 inquiry," it "should have known" of the harassment. *Id.* (*internal quotations omitted*).

20 At the time AP2 auditioned to dance as an entertainer for Frehoo in August of 2014,
21 at least one of the owners (Kaiser) knew of the prevalence of sex trafficking in the United
22 States through his interactions with Spencer of COAST, an organization affiliated with
23 owners of adult entertainment clubs. Posters with warnings about human trafficking were
24 hanging on the walls throughout the club. Frehoo also had knowledge that its former
manager, Toth, had arranged for a 13-year-old girl to perform acts of prostitution on

1 Frehoo's premises with its customers.

2 In this case, AP2 used a false last name and the fake ID given to her by Curry to
3 apply to work at Frehoo. AP2's fake ID had many markings on it that were different from
4 what would appear on a proper Oregon identification card. For example, although the
5 birthdate and issue date reflected that the ID was issued to a minor, the placement of the
6 photo, background color and omission of "under 21" language were inconsistent with an
7 ID issued to an Oregon minor. There were also problems with the spacing between
8 words, and the ID lacked the reflective surface that appears on legitimate Oregon IDs.
9 Dante, a former security guard and manager, testified that there were "definitely little
10 things" on AP2's fake ID that he would have questioned. Moreover, the use of an
11 authenticating machine would have also exposed that the fake ID was not real.¹³
12 Significantly, when AP2 used the fake ID at one club, a bouncer tried to "scan" it and it
13 did not "go through." Had Frehoo's employees reviewed the ID carefully or if Frehoo used
14 an authentication machine, it would have been clear that AP2 could not prove that she
15 was at least 18 years old. In other words, "upon reasonably diligent inquiry," Frehoo
16 "should have known" that AP2 could not consent to the sexual conduct she experienced
17 at Frehoo. Frehoo's entertainers were subjected to conduct that in most workplaces
18 would be unwelcome sexual harassment, yet it did not take necessary steps to make sure
19 that it was hiring women who were old enough to consent to such conduct. Therefore,

21 ¹³ The forum has previously noted that an employer has an obligation to use current technology to prevent
22 sexual harassment. See, e.g. *In the Matter of Robb Wochnick*, 25 BOLI 265, 284 (2004) (when employees
23 received voluminous offensive emails, "an employer's principal obligation is to use whatever current
24 technology is available to block patently inappropriate [email] and reduce the volume of offensive junk
mail"). See also *Freitag v. Ayers*, 468 F3d 528, 540-41 (2006) (finding that a prison failed to respond
adequately to "pervasive" inmate sex abuse directed towards female corrections officers when, among
other things, it did not install equipment used by other prisons as corrective measures).

1 the forum concludes that Frehoo "should have known" of the sexual harassment of AP2.

2 *Corrective Action to Prevent Harassment of Underage Dancers Such as AP2*

3 An employer is not responsible for harassment that it "should have known" about
4 if it took "immediate and appropriate corrective action." OAR 839-005-0030(7). Frehoo
5 contends that after the sexual abuse of AP1 on Frehoo's premises was discovered, it
6 terminated Toth's employment and implemented a policy requiring two employees to "sign
7 off" that they had verified the ID of new dancers. Frehoo had a form in the packet given
8 to new hires for managers to sign, indicating that they had checked identification. Notably,
9 the copy of this form in the file of AP2 and other dancers does not contain signatures
10 showing that this actually occurred. Also, AP2's ID was only checked by one manager
11 *after* she auditioned. Additionally, although she danced for at least six shifts after her
12 audition, her ID was only checked again by a bouncer and bartender. The evidence
13 established that Frehoo did not consistently implement the policy to have two employees
14 check a person's ID. Accordingly, that was not an "immediate and appropriate corrective
15 action" following the discovery that Toth had subjected 13-year-old AP1 to acts of
16 prostitution on Frehoo's premises.

17 Respondents argued that its sexual harassment policy was a means of protecting
18 its entertainers from sexual harassment. The forum finds Frehoo's policy to be
19 inadequate to prevent sexual harassment for the following reasons:

- 20 • Entertainers were expected to tell customers who touched them inappropriately
21 that the customer should stop doing so.
- 22 • The written policy was issued on July 25, 2002, and was never updated.
- 23 • There was no evidence that Frehoo provided sexual harassment training to its
24 managers, employees and entertainers. *See, e.g. Madray v. Publix Supermarkets,*
Inc., 208 F3d 1290, 1298 (11th Cir 2000). ("A policy is 'defective' if those

1 responsible for its enforcement lack training and knowledge sufficient to recognize,
2 prevent and correct workplace discrimination.”); *Clark v. United Parcel Serv., Inc.*,
3 400 F3d 341, 350 (6th Cir 2005) (an effective policy includes training regarding the
4 policy).¹⁴

- 5 • The written policy directed individuals to make complaints to a post office box,
6 Frehoo’s owners (none of whom were regularly onsite¹⁵) and Frehoo’s former
7 attorney (deceased since 2010). In addition, although the cell phone numbers of
8 Kaiser, Mitchell and Struhar were listed on the policy, the policy stated that
9 individuals reporting harassment “should not leave messages and assume that the
10 problem has been communicated.” See, e.g. *Madray v. Publix Supermarkets,*
11 *Inc.*, 208 F3d 1290, 1298 (11th Cir. 2000) (finding a policy adequate in part
12 because “designated, appropriate company representatives were accessible to * *
13 * store employees”); *Wilson v. Tulsa Junior College*, 164 F.3d 534, 541 (10th Cir
14 1998) (policy inadequate when employees were directed to make complaints to an
15 official who was “located in a separate facility” and was not available at night or on
16 weekends).
- 17 • Given that Respondents had never received a complaint of sexual harassment,
18 there is no evidence that the written policy was actually effective in “promptly
19 correcting” any harassment which may have occurred.

20 Moreover, Frehoo cannot avoid liability due to AP2’s lack of a complaint. Notably,
21 a teenager does not have the same abilities or confidence as an adult to make a complaint
22 of sexual harassment. See, e.g. *E.E.O.C. v. V & J Foods, Inc.*, 507 F3d 575, 578 (7th Cir
23 2007) (recognizing the difference between experienced adult employees and the
24 “understanding of the average teenager”); *E.E.O.C. v. KarenKim, Inc.*, 698 F3d 92, 101
n.3 (2d Cir 2012). Given that AP2 was 15 years old at the time she worked at Frehoo, it
was not unreasonable for her to fail to make a complaint under Frehoo’s harassment
policy.

21 ¹⁴ Although federal law similar to Oregon’s civil rights laws is not binding on the forum, federal decisions
22 can be instructive in construing and applying similar state law. See *In the Matter of Kenneth Wallstrom*, 32
BOLI 63, 92 (2012).

23 ¹⁵ In any given week, Mitchell was physically present on Frehoo’s premises an average of 15-20 hours per
24 week, at most. Kaiser and Struhar provided management oversight in Bend and Salem, respectively, and
only occasionally visited the club.

1 In conclusion, Respondents did not take "immediate and appropriate corrective
2 action" to prevent the hiring and sexual harassment of underage dancers. Accordingly,
3 the Agency has sustained its burden of proving that Frehoo is liable for the sexual
4 harassment of AP2 by Frehoo's customers.

5 **B. Harassment by a Supervisor**

6 OAR 839-005-0030(5) applies when there was "sexual harassment by a supervisor
7 with immediate or successively higher authority" over the employee. Frehoo's managers
8 required AP2 to dance nude in front of Frehoo supervisors, employees and customers as
9 a condition of her employment. She also felt uncomfortable and awkward when a curly
10 haired manager stared at her while she danced. Accordingly, the Agency has established
11 that she was harassed by Frehoo's supervisors. Frehoo is liable for supervisory
12 harassment under OAR 839-005-0030(5) if it knew or should have known of the
13 harassment.

14 There is a presumption that Frehoo "should have known of the harassment" by a
15 supervisor unless the Frehoo can demonstrate:

16 "(A) That [Frehoo] exercised reasonable care to prevent and promptly correct any
17 sexually harassing behavior; and

18 "(B) That [AP2] unreasonably failed to take advantage of any preventive or
corrective opportunities provided by the employer or to otherwise avoid harm."

19 OAR 839-005-0030(5)(b); *see also In the Matter of Murrayhill Thriftway, Inc.*, 20 BOLI
20 130, 153 (2000) ("There is a presumption that the employer 'should have known,' unless
21 the employer can prove [the] two-pronged affirmative defense by a preponderance of the
22 evidence"). As discussed in the previous section, Frehoo did not take reasonable care to
23 prevent the harassment of underage women and, even if Frehoo had done so, it was not
24 unreasonable for AP2, a 15-year-old girl, to fail to complain. Accordingly, Frehoo did not

1 sustain its burden to prove the elements of the affirmative defense and it is also liable
2 under OAR 839-005-0030(5) for the sexual harassment of AP2.

3 **LIABILITY OF INDIVIDUAL RESPONDENTS FOR AIDING AND ABETTING**

4 ORS 659A.030(1)(g) provides that it is an unlawful employment practice “[f]or any
5 person, whether an employer or employee, to aid, abet, incite, compel or coerce the doing
6 of any of the acts of this chapter or to attempt to do so.”

7 When an individual assists a business entity in violating a provision of ORS chapter
8 659A, the individual can be liable under ORS 659A.030(1)(g). The legislature enacted
9 the provision that is now in ORS 659A.030(1)(g) in 1949. Or Laws 1949, ch 221, § 5. At
10 that time, “aid and abet” meant to “[h]elp, assist, or facilitate the commission of a crime,
11 promote the accomplishment thereof, help in advancing or bringing it about, or
12 encourage, counsel or incite as to its commission.” *Black’s Law Dictionary* 91 (4th ed
13 1951); see *Allison v. Dolich*, 321 Or App 721, 726, 518 P 3d 591, 595 (2022) (explaining
14 that “[o]ne who aids and abets is one who assists another to commit an act” and
15 concluding the owner and member in that case could be liable because they “assisted the
16 LLCs by making the decisions that enabled the violations”) ¹⁶. Specifically, the legislature
17 intended to impose liability on key decision-makers for a business entity, who make
18 decisions that result in the business violating a person’s rights under ORS chapter 659A.
19 *Allison*, 321 Or App at 726 (“the legislature’s intention was that the persons directing the
20 business-entity employer’s unlawful conduct can be held individually liable under ORS
21 659A.030(1)(g)”). Consistent with that approach, the forum has found that corporate
22

23 ¹⁶ In *Allison*, the court did not define the entire universe of what is actionable under ORS 659A.030(1)(g).
24 It held that a person can be liable for assisting another to violate one of the statutes in ORS chapter 659A.

1 officers and owners who commit acts rendering the corporation liable for an unlawful
2 employment practice may be found to have aided or abetted the corporation's unlawful
3 employment practice. *In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly*
4 *Schoene*, 34 BOLI 80, 97 (2015). See also *In the Matter of Crystal Springs Landscapes,*
5 *Inc.*, 32 BOLI 144, 166437 (2012); *In the Matter of Dr. Andrew Engel, DMD, PC*, 32 BOLI
6 94, 137 (2012); *Cyber Center, Inc.*, 32 BOLI at 35.

7 *Colburn and Heinzman-Myers*

8 Respondents Colburn and Heinzman-Myers were previously dismissed from this
9 matter in the ALJ's interim order of November 8, 2016, which granted a portion of
10 Respondents' motion for summary judgment. (See Procedural Finding of Fact #51,
11 *affirming* the ALJ's summary judgment ruling dismissing Colburn and Heinzman-Myers
12 as parties).

13 *Kaiser, Struhar and Mitchell*

14 The Oregon Court of Appeals remanded to the forum on Kaiser, Struhar, and
15 Mitchell's liability under ORS 659A.030(1)(g). For the reasons set forth below, the forum
16 finds that neither Kaiser nor Struhar aided and/or abetted the sexual harassment of AP2.
17 However, the forum finds that the preponderance of the evidence establishes that Mitchell
18 aided and/or abetted the sexual harassment of AP2.

19 Kaiser and Struhar

20 Kaiser and Struhar were uniformly referred to as "owners" of Frehoo at hearing.
21 Both, together with Mitchell, made policies for the business. Kaiser also performed
22 administrative and accounting functions for Frehoo and addressed legal issues as they
23 arose. Kaiser oversaw the operations of the Bend Stars club. Struhar was Frehoo's
24

1 corporate president and tended to technical issues and facility issues for Frehoo. Struhar
2 was also responsible for overseeing the operations at the Salem Stars club. Neither
3 Kaiser nor Struhar had a regular presence at Frehoo.

4 The preponderance of the evidence does not show that either Kaiser or Struhar
5 were aware of AP2's employment as a dancer or were in a position to direct or to control
6 the operations of Frehoo during the period of AP2's employment. Because the evidence
7 failed to show that Kaiser or Struhar assisted Frehoo's sexual harassment of AP2, the
8 Agency has not sustained its burden in proving that either Kaiser or Struhar aided and/or
9 abetted the sexual harassment of AP2.

10 Mitchell

11 Witnesses also referred to Mitchell as an "owner" of Frehoo. Mitchell oversaw the
12 operations and management at Frehoo. He also served as Frehoo's corporate secretary.

13 Mitchell has significant experience in the adult entertainment industry and
14 previously managed large adult entertainment clubs. He was involved in developing
15 policies for Frehoo. Mitchell was regularly onsite at Frehoo. He delegated the supervision
16 of Frehoo's daily operations to Herkenrath. However, Mitchell maintained control over the
17 club as a whole. For example, when a bartender recognized AP2 as the child listed as
18 missing in a Facebook post, she contacted Mitchell. Mitchell then contacted Herkenrath
19 and directed him on what steps to take.

20 Because Mitchell participated in developing policies for Frehoo, he would have
21 been aware of the age-verification policy adopted after the owners learned that Toth had
22 arranged for AP1, a 13-year-old girl, to perform sexual acts for Frehoo's customers in
23 exchange for money at Frehoo. Despite the seriousness of those prior crimes by a
24

1 Frehoo manager at Frehoo and despite Mitchell's oversight and presence at Frehoo, he
2 did virtually nothing to ensure that key Frehoo policies were followed by the managers.

3 In particular, Mitchell chose not to take specific steps to ensure that Frehoo
4 managers were following Frehoo's age verification policy. As a result, no manager
5 reviewed AP2's identification prior to her audition, during which she danced on stage and
6 removed her clothing until she was fully nude. One manager asked for AP2's
7 identification after her audition and made a copy. However, that manager failed to note
8 the obvious flaws with AP2's ID that should have led to him question the ID's authenticity.
9 Further, there was no "sign off" on AP2's hiring paperwork showing that AP2's ID was
10 examined by Herkenrath or any other Frehoo employee before AP2 began working as a
11 dancer. Mitchell's decision not to ensure that age-verification steps were followed—under
12 the circumstances of this case—assisted Frehoo's violations.

13 Despite the past crimes at Frehoo, Mitchell also did not require that Frehoo have
14 a sufficient sexual harassment policy or ensure that rules about customer's not touching
15 dancers were enforced. Mitchell must have known about the no-touching rule. And
16 because Mitchell was at Frehoo regularly, he knew how the VIP room was setup. The
17 lighting was dim, there were curtains, and security was at the entrance not inside the
18 room. AP2 was regularly subjected to unwanted suggestive comments by Frehoo
19 customers, as well as unwanted touching. No member of management or security ever
20 intervened. By allowing the VIP room to be setup as it was and not enforcing a sufficient
21 sexual harassment policy, Mitchell assisted Frehoo's violations.

22 Given his experience and the recent history of AP1 at the club, Mitchell should
23 have known of the likely consequences of failing to enforce the age-verification policy,
24

1 failing to develop and implement sufficient sexual harassment policies, and failing to
2 enforce the rules in place meant to protect against sexual harassment. In these
3 circumstances, Mitchell's failure to ensure that Frehoo's policies were sufficient and being
4 followed by Frehoo managers assisted Frehoo's violations by creating an environment in
5 which the unlawful sexual harassment experienced by AP2 likely would and, in fact, did
6 occur. Therefore, the Agency has sustained its burden to prove that Mitchell aided and/or
7 abetted the sexual harassment of AP2 by Frehoo's customers.

8 *Herkenrath*¹⁷

9 Herkenrath was physically present on Frehoo's premises when AP2 came in to
10 audition and during other shifts that she worked. At that time, he served as the general
11 manager of the club and admitted that general managers were responsible for anything
12 that happened in the club. Despite this responsibility, he never once checked AP2's ID
13 nor confirmed that any other person carefully reviewed her ID. Given the nature of
14 Respondents' business, verifying the age of a prospective nude dancer is essentially the
15 only means of making sure a woman is capable of consenting to engage in public sexual
16 conduct. Accordingly, as Frehoo's general manager responsible for the club's operations,
17 Herkenrath made it "easier" and "less difficult" for the harassment of AP2 to occur and,
18 thus, he facilitated unlawful sexual harassment¹⁸. Accordingly, the Agency sustained its
19 burden to prove that Herkenrath aided and abetted the harassment of AP2 by Frehoo's
20

21 ¹⁷ Herkenrath did not seek review of the original BOLI decision and so the forum has not revisited this
22 section.

23 ¹⁸ The conclusion that Herkenrath aided and abetted the sexual harassment of AP2 was not part of the
24 remand order of the Oregon Court of Appeals. As such, the conclusion that Herkenrath is jointly and
severally liable for the damages resulting from the unlawful employment practice by Frehoo remains the
same in this Amended Final Order.

1 customers.

2 **DAMAGES**

3 The Formal Charges seek damages for “emotional and physical suffering” in the
4 amount of “at least \$4,000,000” for each of the two aggrieved persons. Pursuant to ORS
5 659A.850, the Commissioner of the Bureau of Labor and Industries has the authority to
6 award money damages for emotional, mental, and physical suffering sustained. *In the*
7 *Matter of Leo Thomas Ryder dba Leo's BBQ Bar & Grill*, 34 BOLI 67, 76 (2015). *See also*
8 *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 263, 592 P2d 564, 570 (1979), *rev*
9 *den* 287 Or 129 (1979). The commissioner has the authority to fashion a remedy
10 adequate to eliminate the effects of unlawful employment practices. *Leo's BBQ*, 34 BOLI
11 at 76.

12 In determining an award for emotional and physical suffering, the forum considers
13 the type of discriminatory conduct, and the duration, frequency, and severity of the
14 conduct. It also considers the type and duration of the mental distress and the
15 vulnerability of the aggrieved persons. An aggrieved person's testimony, if believed, is
16 sufficient to support a claim for mental suffering damages. *In the Matter of Dr. Andrew*
17 *Engel, DMD, PC*, 32 BOLI 94, 141(2012), *citing In the Matter of From the Wilderness*, 30
18 BOLI 227, 290 (2009).

19 Through AP2's credible testimony, the Agency proved that AP2 experienced
20 emotional and mental suffering as a result of the sexual harassment by Frehoo's
21 customers. During the time AP2 was performing at Frehoo, she was only 15 years old.
22 While she danced fully nude on stage, she believed that the customers were thinking
23 disgusting, sexual things about her. She felt awkward and uncomfortable interacting with
24

1 the staff and did not want to be there. While performing private dances, she had to defend
2 herself from inappropriate touching by older men who were under the influence of alcohol.
3 Some of the men tried to get their hands inside her underwear and wanted her to touch
4 them inside of their pants. She found it necessary to consume marijuana and alcohol to
5 help push aside her emotions and get through the experience. She felt like a "sex robot."

6 After the police apprehended Curry and AP2 was reunited with her mother, she
7 was ashamed to tell her mother that she had danced nude in front of customers. When
8 she first returned home, she saw a therapist for about three months, but was
9 uncomfortable talking to a stranger about her feelings and what happened. She still has
10 dreams and flashbacks about taking her clothes off and being nude in front of people,
11 and about having customers touch her. AP2 finds it hard to live life as a regular teenager.
12 She does not feel normal on dates with boys and often wonders if they want to "grab" her
13 and take advantage of her.

14 In determining the appropriate amount of mental and physical suffering damages,
15 "this forum has long held that Respondents must take Complainants 'as they find them.'"
16 *In the Matter of Kara Johnson dba Duck Stop Market*, 34 BOLI 2, 37 (2014), *appeal*
17 *pending*. The actual amount depends on the facts presented by each aggrieved person.
18 *See, e.g., In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa*, 34 BOLI
19 102, 127-28 (2015), *appeal pending* (one Complainant awarded \$60,000 and second
20 Complainant awarded \$75,000 for public accommodation discrimination based on their
21 sexual orientation); *In the Matter of Andrew W. Engel, DMD*, 32 BOLI 94 (2012)
22 (Complainant subjected to harassment based on her religious belief suffered anxiety,
23 stress, insomnia, gastrointestinal problems and weight loss requiring medical treatment
24

1 awarded \$350,000); *In the Matter of From The Wilderness, Inc.*, 30 BOLI 227 (2009)
2 (Complainant subjected to verbal and physical sexual harassment for two months before
3 being fired and then retaliated against after termination suffered panic attacks requiring
4 medical treatment awarded \$125,000); *In the Matter of Maltby Biocontrol, Inc.*, 33 BOLI
5 121 (2014) (Complainants subjected to racially hostile environment including assault,
6 threats with a firearm, racial epithets and retaliation for reports to police suffered fear,
7 sleeplessness and physical injuries requiring medical treatment awarded \$50,000 and
8 \$100,000 each); *In the Matter of Charles Edward Minor*, 31 BOLI 88, 105 (2010)
9 (Complainant subjected to verbal and physical sexual harassment including respondent
10 striking her in the head with his fist suffered anxiety, reclusiveness and fear awarded
11 \$50,000).

12 Although AP2 was not harassed at Frehoo over a number of months or years, the
13 forum finds that the harm suffered by AP2 is more severe than in any previous case
14 presented to this forum due to her young age and the public, sexually explicit, and
15 exploitative nature of the harassment. The Agency and Respondents submitted briefing
16 showing a wide range of amounts awarded to sexual harassment victims, including
17 awards spanning from a couple hundred thousand dollars to \$1 million. (See Procedural
18 Finding of Fact #65). The Agency's briefing also discussed amounts awarded to
19 individuals who were sexually abused as children which exceeded \$1,000,000. *Id.*

20 Taking all of these factors into consideration, the forum concludes that \$1,000,000
21 is an appropriate award to compensate AP2 for her emotional and physical suffering.
22 This amount is awarded to AP2 due to the harm she suffered as a result of the harassment
23 at Frehoo, and is not based on any harm that she may have suffered as a result of other
24

1 traumatic experiences in her life.

2 **ADDITIONAL RELIEF REQUESTED BY THE AGENCY**

3 In its Amended Formal Charges, the Agency asked that Respondents be ordered
4 to cease and desist from continuing to violate laws pertaining to discrimination because
5 of sex and sexual harassment in the workplace. The Agency also requested that
6 Respondents be enjoined from violating sex discrimination and sexual harassment laws.
7 BOLI's Deputy Commissioner is authorized to issue an appropriate cease and desist
8 order reasonably calculated to eliminate the effects of any unlawful practice found. ORS
9 659A.850(4). Among other things, that may include requiring a respondent to:

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

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

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

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

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

21 **EXCEPTIONS TO THE PROPOSED ORDER**

22 **AGENCY'S EXCEPTIONS**

23 The Agency filed exceptions to the Proposed Findings of Fact – The Merits,
24 Proposed Opinion, and Proposed Findings of Fact – Procedural, which are addressed
below.

25 *Agency Exceptions to Proposed Findings of Fact – The Merits*

26 The Agency first requested that additional facts be included in the Order and,

1 secondly, raised exceptions to specific findings made by the ALJ.

2 A. Additional Findings of Fact¹⁹ Requested by the Agency

3 The Agency presented a list of 11 facts separated by bullet points that the Agency
4 contends should be inserted into the Final Order. The numbers listed below correspond
5 to the order in which the bullet points were presented in the Agency's Exceptions.

6 1. The requested additional facts duplicate those contained in Finding of Fact
7 # 5, and the forum declines to add the Agency's suggested language.

8 2. Finding of Fact #3 has been supplemented to reflect that Kaiser, Mitchell
9 and Struhar also collectively made decisions about policies at Frehoo.

10 3. The requested additional facts duplicate those contained in Finding of Fact
11 # 88 which states that "credible evidence demonstrated that the rules were not strictly
12 enforced." The forum declines to add the Agency's suggested language.

13 4. The forum declines to add the Agency's requested language regarding the
14 testimony of Amy, the bartender. Amy's testimony did not demonstrate that she was
15 certain about the timing of some events. For example, when Amy was asked when she
16 saw the missing child Facebook posting, she responded, "It was within -- it was within a
17 day or two. I mean, she was in there. I feel like it was within a day or two of AP2 being
18 in there." The forum declines to make a finding based on this equivocal testimony.

19 5. The forum also declines to adopt the language requested by the Agency in
20 Bullet Point 5 as it is dependent upon Amy's uncertain testimony regarding the timing of
21 events and Respondents' unreliable paperwork. Amy testified that the police came to
22

23 ¹⁹ To be concise, references to "Findings of Fact – The Merits" will simply state "Findings of Fact." When
24 procedural findings of fact are referenced, it will state "Findings of Fact – Procedural."

1 Frehoo on the "same day" she made a report to management about the missing child
2 Facebook posting. The Agency requests that the forum rely on Respondents' daily logs
3 to conclude that Amy worked additional shifts with AP2 after her report. However, given
4 the inconsistencies in the accuracy of Respondents' paperwork, the forum is unable to
5 make a conclusion as to the exact date when Amy discovered the Facebook posting and
6 reported it to management.

7 6. Finding of Fact # 28 has been supplemented to clarify that Toth's guilty plea
8 for promoting prostitution involved three dancers at Frehoo and the remainder of his
9 crimes involved his conduct towards AP1.

10 7. Findings of Fact ## 28 and 73 establish that AP1 was the victim of Toth's
11 crime of compelling prostitution in the FE room on Frehoo's premises. The forum declines
12 to add the Agency's requested language.

13 8. Some of the information the Agency requests in this bullet point is contained
14 in Finding of Fact # 75. For the sake of completeness, continuity and context, Finding of
15 Fact # 28 is amended to note that when Herkenrath saw AP1 in the club with Toth, he
16 was comfortable with her being there and assumed that Toth either knew her age or had
17 checked her ID.

18 9. The requested additional facts are repetitive of those contained in Finding
19 of Fact # 26. The forum declines to add the Agency's suggested language.

20 10. The requested additional facts are repetitive of those contained in Findings
21 of Fact ## 39 and 77. The forum declines to add the Agency's suggested language.

22 11. Finding of Fact # 5 has been supplemented to clarify that, "at Kaiser's
23 direction," Frehoo's manager requested that BOLI investigators wait until Kaiser arrived
24

1 before completing an onsite review.

2 B. The Agency's Exceptions to Proposed Findings of Fact

3 The Agency also raised exceptions to specific Proposed Findings of Fact made by
4 the ALJ in the Proposed Order. The numbers listed below correspond to the Proposed
5 Findings of Fact.

6 5) The Agency first takes issue with the statement that Kaiser "did not have
7 responsibility for implementing policies at Frehoo." However, Kaiser credibly testified that
8 he did not take on "any responsibility for implementation of policies" at Frehoo. To
9 "implement" means "to carry out: accomplish, fulfill * * * esp: to give practical effect to and
10 ensure of actual fulfillment by concrete measures." *Webster's Third New Int'l Dictionary*
11 1134 (unabridged ed 2002). The record is clear that Kaiser did not "give practical effect
12 to" policies at Frehoo and "ensure * * * by concrete measures" that policies such as the
13 "two-person ID check" were actually carried out and accomplished. The definition of
14 "implement" is consistent with the remainder of Kaiser's testimony and with that of
15 Frehoo's other owners in that Kaiser helped enact policies for Frehoo, but he himself did
16 not take measures to put those policies into place. Aside from communicating to
17 someone at Frehoo that there was a new policy, he did not take on "any responsibility for
18 implementing policies." Nevertheless, to avoid any confusion in the factual record, the
19 word "implementing" has been removed and the Finding of Fact has been modified to
20 clarify Kaiser's role with respect to policy revisions at Frehoo.

21 With respect to the second part of the Agency's exception, this Finding of Fact has
22 been modified to indicate that Kaiser directed Frehoo's manager to request that BOLI
23 investigators wait until Kaiser arrived before completing an onsite review.

1 14) This Finding of Fact has been modified to clarify the reasons for walking
2 dancers out to their cars. The phrase "were not permitted" was removed because,
3 although there was testimony that there was a "rule" against dancers and employees
4 leaving with customers, that rule was not consistently enforced. (Finding of Fact #28)

5 23) This Finding of Fact was modified to clarify that the OLCC does not permit
6 minors to access certain areas of the club where alcohol is served.

7 26) The forum declines to modify this Finding of Fact in response to the
8 Agency's exception. Mitchell and Kaiser were informed that on one occasion that Toth
9 allowed Tru to leave the club with Wheeler and that she subsequently reported that she
10 was upset when Wheeler asked her for a sexual favor. Toth's conduct in allowing Tru to
11 leave was against the club's stated policy. However, the forum is unable to draw an
12 inference that Tru's complaint about Wheeler was a complaint that "Toth was involved in
13 prostitution."

14 *The Agency's Exceptions to Credibility Findings*

15 The Agency's exceptions to the Credibility Findings are denied because the
16 Findings are supported by substantial evidence on the record. *See Wallstrom, Kenneth*,
17 32 BOLI 63, 92-93 (2012) ("exceptions to the ALJ's credibility findings are denied because
18 those findings are supported by substantial evidence in the record"); *Gordy's Truck Stop*,
19 *LLC.*, 28 BOLI 200, 216 (2007) ("an ALJ's credibility findings are accorded substantial
20 deference and absent convincing reasons for rejecting those findings, they are not
21 disturbed").

22 *The Agency's Exceptions to the Proposed Opinion*

23 The Agency first contends that Frehoo should be found liable under OAR 839-005-
24

1 0030(5) for sexual harassment by a supervisor. In addition, the Agency asserts that
2 Kaiser, Mitchell and Struhar should be found liable as aiders and abettors under ORS
3 659A.030(1)(g). For the reasons discussed in the Opinion section above, the forum
4 agrees with the Agency and the Exceptions to the Proposed Opinion are granted.

5 *The Agency's Exceptions to Proposed Findings of Fact - Procedural*

6 The Agency's exceptions to the Findings of Fact – Procedural are denied.

7 **RESPONDENTS' EXCEPTIONS**

8 Respondents filed exceptions to the Proposed Findings of Fact – The Merits,
9 Proposed Conclusions of Law/Opinion, and Proposed Findings of Fact – Procedural,
10 which are addressed below.

11 *Respondents' Exceptions to Proposed Findings of Fact – The Merits*

12 Respondents raised exceptions to specific Proposed Findings of Fact contained in
13 the Proposed Order. The letters and numbers below correspond to the letters and
14 numbers used in Respondents' Exceptions.

15 I.A. Respondents' Exception I.A. is denied because the requested language is
16 not material to the forum's analysis of the claims asserted on behalf of AP2.

17 I.B. The forum grants Respondents' Exception I.B. Finding of Fact #23 has
18 been amended to cite to Herkenrath's testimony.

19 I.C. The forum grants Respondents' Exception I.C. Finding of Fact #22 has
20 been amended to remove the phrase "in the Portland area."

21 I.D. Respondents' Exception I.D. is denied because Finding of Fact # 24 is
22 pertinent to Frehoo's enforcement of rules pertaining to minors.

23 I.E. Respondents' Exception I.E. is denied because the requested language is
24

1 not material to the forum's analysis of the resolution of the claims of AP2.

2 I.F. Respondents' Exception I.F. is denied. Kaiser knew that prostitution
3 occurred inside the club after Toth's arrest and conviction. Kaiser's denial of that fact is
4 not credible. See Findings of Fact ## 26, 28, 29.

5 I.G. Respondents' Exception I.G. is denied. The requested new language does
6 not accurately reflect the record and does not add information pertinent to the forum's
7 analysis.

8 I.H. Respondents' Exception I.H. is denied. The requested new language does
9 not add information pertinent to the forum's analysis.

10 I.I. Respondents' Exception I.I. is granted in part to: (1) replace "93" with "92"
11 as the year of the date of birth on AP2's fake ID; (2) replace the word "background" with
12 "border;" and (3) include additional explanation about the issue date on the fake ID. The
13 remainder of the exception is denied as it either inconsistent with credible evidence on
14 the record or requests that the forum add information that is not pertinent to the forum's
15 analysis of the claims at issue.

16 I.J. The forum denies Respondents' Exception I.J. AP2 testified that Curry
17 argued with the bouncer who scanned her ID and said that it did not go through, and that
18 it was a fake ID. After Curry complained and asked to see the manager, the manager
19 told the bouncer, "Okay. Just let them come in." The fact that a manager at another club
20 allowed AP2 to enter that club when her ID was rejected by a machine scanner has no
21 bearing as to whether she could legally be hired as a nude dancer at Frehoo.

22 I.K. The forum denies Respondents' Exception I.K. The requested language is
23 repetitious of language in Finding of Fact # 35 stating that AP2 used the fake ID and was
24

1 hired by other clubs.

2 I.L. The forum denies Respondents' Exception I.L. The requested language is
3 repetitious of language in Finding of Fact # 37 stating that AP2 "presented herself to the
4 club as an experienced dancer." Additionally, although witnesses testified that they did
5 not know AP2 was underage, the forum is unable to conclude that "no one at Stars" knew
6 her actual age.

7 I.M. The forum denies Respondents' Exception I.M. The requested language is
8 repetitious of language in Finding of Fact # 37 stating that AP2 "presented herself to the
9 club as an experienced dancer."

10 I.N. The forum denies Respondents' Exception I.N. The sentences
11 Respondents seek to strike are supported by AP2's credible testimony about how she felt
12 while working at Frehoo, not her outward appearance.

13 I.O. The forum denies Respondents' Exception I.O. as Finding of Fact # 48
14 describes the conditions AP2 was exposed to while working at Frehoo and it states that
15 she did not participate in the bachelor party dances.

16 I.P. The forum denies Respondents' Exception I.P. Although witnesses testified
17 that they were not aware of her relationship with Curry, the forum is unable to conclude
18 that "[n]o one working at Stars was aware" of her situation.

19 I.Q. The forum denies Respondents' Exception I.Q. AP2 credibly testified: "And
20 I knew that there wouldn't be anyone to really help me. It was, like, my battle to fight* * *
21 I just didn't see -- I didn't find any purpose on telling it because I didn't feel like it would
22 be any -- any help or any different." Respondents misunderstand the forum's credibility
23 finding (Finding of Fact # 64) regarding the inconsistency between the interrogatory
24

1 response and hearing testimony. Finding of Fact # 64 described AP2's inconsistent
2 statements as to whether someone intervened to help her when a customer touched her
3 inappropriately; that Finding did not address why AP2 did not make a complaint.

4 I.R. The forum denies Respondents' Exception I.R. There was conflicting
5 testimony as to how attentive and responsive security and management personnel were
6 to requests for assistance with customers.

7 I.S. The forum denies Respondents' Exception I.S. As previously stated when
8 discussing the Agency's exceptions, the record is not clear as to the date Amy discovered
9 the Facebook posting and reported it to management.

10 I.T. The forum denies Respondents' Exception I.T. The record is not clear as
11 to the date Amy reported the Facebook posting and, thus, the forum is unable to conclude
12 whether that is the same date Herkenrath called Det. Opitz.

13 I.U. The forum denies Respondents' Exception I.U. as the requested language
14 does not relate to the harm AP2 suffered based on her experiences at Frehoo. Indeed,
15 Respondents' suggest that AP2 is better off having been subjected to the humiliating
16 experience of dancing nude and being sexually harassed while working for Frehoo. The
17 forum declines to make that conclusion.

18 I.V. The forum denies Respondents' Exception I.V. for the same reasons
19 Exception I.U. was denied.

20 *Respondents' Exceptions to Proposed Conclusions of Law/Proposed Opinion*

21 The forum denies all of Respondents' exceptions to the Proposed Conclusions of
22 Law and Proposed Opinion for the reasons discussed in the Opinion section above, with
23 one exception. The phrase "the sex trafficking and harassment of AP1" has been
24

1 removed and replaced with the words: "that Toth had subjected 13-year-old AP1 to acts
2 of prostitution on Frehoo's premises."

3 *Respondents' Exceptions to Proposed Credibility Findings*

4 Respondents' exceptions to the Credibility Findings are denied because the
5 Findings are supported by substantial evidence on the record. See *Wallstrom*, 32 BOLI
6 at 92-93 (2012); *Gordy's Truck Stop, LLC*, 28 BOLI at 216 (2007).

7 *Respondents' Exceptions to Proposed Damages and Additional Relief*

8 A. Manner of Payment

9 Respondents object to the portion of Proposed Order section which contains
10 instructions for the method of payment. Since that section does not violate the order of
11 the bankruptcy court, this exception is denied.

12 B. Allocation of Damages

13 Respondents contend that ORS chapter 659A does not authorize joint and several
14 liability and, therefore, the forum should allocate damages based on contribution to harm.
15 This exception is denied. The forum's long term precedent establishes that aiders and
16 abettors are jointly and severally liable. See, e.g., *In the Matter of Blue Gryphon, LLC*,
17 and *Flora Turnbull*, 34 BOLI 216, 238 (2015); *Engel, Dr. Andrew, DMD, PC*, 32 BOLI 94,
18 137 (2012); *Allied Computerized Credit & Collections, Inc.*, 9 BOLI 206, 218 (1991).

19 C. Cease and Desist Order Against Frehoo

20 Respondents argue that Frehoo is not operational and, thus, the forum should not
21 issue a cease and desist order against it. The forum has previously declined to award
22 nonmonetary relief when the evidence established that such remedies "would be a futile
23 exercise of the forum's authority" because an employer "is no longer doing business in
24

1 Oregon" and "there is no indication in the record that [the employer] has any intention of
2 resuming business in Oregon in the future." *In the Matter of Maltby Biocontrol, Inc.*, 2014
3 BOLI 121, 157 (2014). Unlike the situation in *Maltby*, the record in this matter does not
4 conclusively establish that Frehoo has "no intention of resuming business in Oregon in
5 the future." Therefore, this exception is denied.

6 D. Cease and Desist Order Against Herkenrath

7 Respondents similarly object to a cease and desist order against Herkenrath for
8 the same reasons as they objected to the cease and desist order against Frehoo. This
9 exception is denied for the same reasons as the previous exception was denied.

10 E. BOLI's Authority to Award Emotional Distress Damages

11 Respondents contend that BOLI lacks the authority to award emotional distress
12 damages. In short, Respondents assert that the phrase "actual damages" was inserted
13 into ORS 659A.850(4)(a)(B) in 2007 to apply to housing discrimination cases only, and
14 was not intended to apply to cases involving employment discrimination. The forum
15 disagrees with Respondents' position for several reasons.

16 First, Respondents' argument is inconsistent with a plain reading of the statute,
17 which does not differentiate between employment discrimination and housing
18 discrimination cases. The remedies in ORS 659A.850(4)(a)(B) apply to "any respondent
19 found to have engaged in *any* unlawful practice alleged in the complaint." (Emphasis
20 added). "'Unlawful practice' means *any* unlawful employment practice or any other
21 practice specifically denominated as an unlawful practice in [ORS chapter 659A]."
22 (Emphasis added) "[L]egislative history cannot substitute for, or contradict the text of, [a]
23 statute." *White v. Jubitz Corp.*, 347 Or 212, 219 P3d 566 (2009); *see also State v. Gaines*,

1 346 Or 160, 173, 206 P.3d 1042 (2009) ("When the text of a statute is truly capable of
2 having only one meaning, no weight can be given to legislative history that suggests—or
3 even confirms—that legislators intended something different."); *see also State v. Tyson*,
4 243 Or App 94, 99, 259 P3d 64, 66, *rev den*, 351 Or 401 (2011). Given the clear language
5 in the statute, Respondents' interpretation of legislative history cannot overcome the
6 authorization of an award of "actual" damages.

7 Second, even if legislative history were to be considered, it does not advance
8 Respondents' argument. Respondents erroneously assert that the statute was "originally
9 enacted in 2001." However, Respondents' position ignores the fact that the statute at
10 issue was part of 2001 revisions reorganizing most of *former* ORS chapter 659 into the
11 *current* ORS chapter 659A. This was not an original enactment. "[L]egislative history is
12 most useful when it is able to uncover the manifest general legislative intent behind an
13 enactment." *Matter of Comp. of Muliro*, 359 Or 736, 753, 380 P3d 270 (2016) (internal
14 quotations omitted). The revisions at issue were part of House Bill (HB) 5352 (2001) –
15 an overall restructuring of Oregon's civil rights statutes. Ex. F to Judiciary Subcommittee
16 on Civil Law, HB 2532, February 5, 2001 (written testimony of former BOLI commissioner
17 Jack Roberts)The Oregon Law Commission (OLC) proposed HB 5352 to reorganize and
18 consolidate the civil rights statutes enforced by the Oregon Bureau of Labor and
19 Industries into one chapter – ORS chapter 659A. *Id.* It aimed to put Oregon's civil rights
20 laws "into more logical order, address unclear or inconsistent language relating to
21 enforcement procedures, and make the statutes easier for the reader to understand and
22 use." Ex. G to Judiciary Subcommittee on Civil Law, HB 2532 (Oregon Law Commission's
23 Report on the Civil Rights Statutes, 11/17/200). The OLC "endeavored to fix the
24

1 organization problems" that existed in the civil rights laws "without changing the
2 substance." *Id.*

3 Although the overall purpose of the statutory revisions was to reorganize the civil
4 rights statutes without changing the substance, there were some changes of substance
5 made. For example, the statute prohibiting discrimination against workers applying for
6 workers' compensation benefits was amended to indicate that the "section applies only
7 to employers who employ six or more persons." Compare ORS 659.410 (1999) to
8 659A.040(1),(2) (2001). However, there is no indication in the legislative history that the
9 legislature intended to change the statute involving remedies to remove the ability to
10 award actual damages. It has long been understood that BOLI's Commissioner has the
11 authority to award damages to a person who has been aggrieved by an unlawful
12 employment practice. *Williams v. Joyce*, 4 Or App 482, 504, 479 P2d 513, 524 (1971)
13 (concluding that former ORS 659.010(2)²⁰ gave BOLI's Commissioner the right to award
14 damages for mental suffering); *Fred Meyer, Inc.*, 39 Or App at 260 (upholding *Williams*
15 and noting that the legislature had amended the statute after the *Williams* decision but
16 did not exclude emotional distress damages as a permissible remedy). See also *Gaudry*
17 *v. Bureau of Labor and Industries*, 48 Or App 589, 617 P2d 668 (1980) (affirming award
18 of damages for mental anguish, humiliation and frustration); *Schipporeit v. Roberts*, 93
19 Or App 12, 15 (1988) (confirming that BOLI's Commissioner had the authority to award

21 ²⁰ At the time of the decision in *Williams v. Joyce*, the pertinent part of ORS 659.010(2) stated:

22 "(2) 'Cease and desist order' means an order * * * issued to eliminate the effects of any unlawful
23 practice found, addressed to a respondent requiring him to:

24 "(a) Perform an act * * * reasonably calculated to carry out the purposes of ORS 659.010 to 659.110,
eliminate the effects of an unlawful practice found, and protect the rights of the complainant and
other persons similarly situated * * *."

1 damages, including damages for mental distress); *aff'd*, 308 Or 199, 778 P2d 953 (1989).

2 Therefore, this exception is denied.

3 F. Respondents' Right to a Jury Trial

4 Respondents assert that an award for emotional distress damages would deprive
5 Respondents of a right to a jury trial under Article I, section 17 of Oregon's Constitution.

6 This exception is denied for the reasons set forth in Finding of Fact – Procedural # 29.

7 G. Amount of Damages

8 Respondents disagree with the amount of damages, arguing that the award is
9 excessive. The forum denies this exception for the reasons set forth in the Opinion
10 section. The forum also disagrees with Respondents' argument that the award for
11 damages is somehow related to other harm AP2 suffered in her life based on the conduct
12 of other individuals not associated with Frehoo. Given AP2's young age of 15 and the
13 significant harm she suffered due to the sexual harassment at Frehoo (including dancing
14 nude on stage and being groped by older male customers), \$1,000,000 is an appropriate
15 award of emotional distress damages for the harm caused by Respondents.

16 OAR 839-005-0030(5).

17 **ORDER**

18 A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS
19 659A.850(4), and to eliminate the effects of the violations of ORS 659A.030(1)(b), ORS
20 659A.030(1)(g), OAR 839-005-0021, OAR 839-005-0030(1)(a)(A), OAR 839-005-
21 0030(1)(b), OAR 839-005-0030(5) and OAR 839-005-0030(7) by Respondents **Frehoo,**
22 **Inc., Jon Herkenrath, and Todd Mitchell** and as payment of the damages awarded, the
23 Deputy Commissioner of the Bureau of Labor and Industries hereby orders Respondents
24


1 **Frehoo, Inc., Jon Herkenrath, and Todd Mitchell** to deliver to the Administrative
2 Prosecution Unit of the Bureau of Labor and Industries, 1800 SW First Avenue, Suite 500,
3 Portland, Oregon 97201, a certified check payable to the Bureau of Labor and Industries
4 in trust for AP2 in the amount of:

5 1) ONE MILLION DOLLARS (\$1,000,000.00), representing
6 compensatory damages for emotional and physical suffering experienced by AP2
as a result of Respondents' unlawful employment practices found herein; plus,

7 2) Interest at the legal rate on the sum of ONE MILLION DOLLARS
8 (\$1,000,000.00), until paid.

9 B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and 659A.850(4),
10 and to eliminate the effects of Respondents' unlawful employment practices found herein,
11 the Deputy Commissioner of the Bureau of Labor and Industries hereby orders
12 **Respondents Frehoo Inc., Jon Herkenrath, and Todd Mitchell** to cease and desist
13 from violating laws pertaining to discrimination because of sex and sexual harassment in
14 the workplace.

15 C. The charges of aiding and abetting against Respondents Pamela Colburn
16 Lisa Heinzman-Myers, Randy Kaiser, and Jeff Struhar are hereby dismissed.

17
18 

19 Jessica Giannettino Villatoro, Deputy Commissioner
20 Bureau of Labor and Industries

21 ISSUED ON

22 1/25/24
23
24

1 **APPENDIX A**

2 **FINDINGS OF FACT – PROCEDURAL**

3 1) On July 27, 2015, Brad Avakian, Commissioner of the Oregon Bureau of
4 Labor and Industries, filed a verified complaint with the Agency's Civil Rights Division
5 ("CRD") alleging that Frehoo, Inc. dba Stars Cabaret & Steak House employed two female
individuals under the age of 16 and that the conditions of employment for the minors
constituted sexual harassment under OAR 839-005-0030, in violation of ORS
659A.030(1)(b). (Ex. A1)

6 2) The Commissioner's complaint was amended on January 4, 2016, to add
the following additional parties as Respondents:

7 High Life, LLC
8 IHAT, Inc.
9 JMS Holdings, Inc.
NIMBY, LLC
MJ10, Inc.
10 NPC Concepts, LLC
NPC Properties, LLC
11 RGK Holdings, Inc. fka Phoenix Holdings, Inc.
SCS2, Inc. DBA Stars Cabaret ... At The Capitol
12 SCTO, Inc. DBA Stars Cabaret ..Bridgeport
SHM Holdings, Inc.
13 Weston Court Properties, LLC
W.T.H., Inc. DBA Stars Cabaret ... In The Cascades

14 Additionally, the following individuals were named as aiders and abettors, citing
15 "ORS 659A.030(1)(b)(g)":

16 Pamela Colburn
17 Lisa Heinzman-Myers
Jonathan Herkenrath
18 Randy Kaiser
Todd Mitchell
19 Jeff Struhar

20 (Ex. A3)

21 3) On February 3, 2016, the Agency's Civil Rights Division issued a Notice of
22 Substantial Evidence Determination ("SED") in which it found substantial evidence of an
unlawful employment practice (sex harassment), in violation of ORS 659A.030(1)(b) and
23 an unlawful employment practice (aiding and abetting of unlawful sex harassment), in
violation of ORS 659A.030(1)(g) with respect to both female minors identified in the
Commissioner's complaint. (Ex. A8)

1 4) On March 29, 2016, the Agency submitted a Request for Hearing to the
forum. (Ex. X1)

2 5) On March 31, 2016, the Agency issued Formal Charges. The caption in
3 this case listed Frehoo, Inc. dba Stars Cabaret & Steak House ("Frehoo") as the only
4 corporate Respondent. Following the identification of Frehoo as a party, the entities
named in the SED were listed, each preceded by the acronym "aka." The individuals
5 named as aiders and abettors in the SED were also identified as Respondents.

6 The Formal Charges alleged that Respondents discriminated against both
agrieved persons²¹ in compensation or in terms, conditions or privileges of employment,
7 in violation of ORS 659A.030(1)(b), *former* and *current* OAR 839-005-0021(1), (2) and
former and current OAR 839-005-0030. The Formal Charges also alleged that all of the
8 individual Respondents "aided, abetted, incited, compelled and/or coerced acts forbidden
under ORS chapter 659A, specifically the unlawful practices alleged here, and [are]
9 individually liable for violations alleged herein as an aider and abettor pursuant to ORS
659A.030(1)(g)." The Formal Charges sought "[d]amages for emotional and physical
10 suffering for each aggrieved person in the amount of at least \$4,000,000." The Formal
Charges did not include the names of the individuals for whom damages were being
11 sought. (Ex. X2)

12 6) On March 31, 2016, the forum issued a Notice of Hearing stating the time
and place of the hearing as August 2, 2016, beginning at 9:30 a.m., at BOLI's Portland,
13 Oregon office. Together with the Notice of Hearing, the forum sent a copy of the Formal
Charges, a multi-language warning notice, a document entitled "Summary of Contested
14 Case Rights and Procedures" containing the information required by ORS 183.413, a
document entitled "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of
15 the forum's contested case hearing rules, OAR 839-050-000 to 839-050-0445. (Ex. X2,
X2a-X2f)

16 7) The Agency filed a motion for protective order on April 5, 2016, seeking to
protect "Personal Identifying Information" ("PII") of the Aggrieved Persons. A prehearing
17 telephone conference was held on April 13, 2016, to discuss the Agency's motion for
protective order. During the conference, all parties agreed to the following:

- 18 • The Agency's Motion for Protective Order should be granted, and the
19 definition of PII contained in footnote 1 of the Agency's motion was appropriate.
- 20 • The sample form of protective order emailed by Respondents' attorney on
21 April 11, 2016, was acceptable, subject to appropriate revisions to adapt the order
to this forum and to the specifics of this case.

22
23
24 ²¹ An "aggrieved person" is "a person on whose behalf the complaint is filed" by the Commissioner. OAR
839-050-0020(5)(b).

1 • Should Respondents' counsel need to disclose the aggrieved persons' PII,
2 pursuant to a factual investigation and/or discovery process in this case,
3 Respondents' counsel will retain written acknowledgements signed by each and
4 every individual to whom a disclosure of said personal identifying information was
5 made. The written acknowledgment will reflect that the individual has read the
6 protective order and agrees to abide by its terms.

7 • A draft of the Protective Order was provided to the parties. The Agency
8 requested revisions to the document. After the Agency conferred with
9 Respondents' attorney, a revised document was emailed to the ALJ and the
10 requested changes were incorporated into a Protective Order.

11 The interim Protective Order was issued on April 27, 2016, which contained the following
12 definition of PII:

13 "Any written document or electronic data that does, or purports to, provide
14 information concerning: the aggrieved person's name, address or telephone
15 number; the aggrieved person's driving privileges; the aggrieved person's Social
16 Security number or tax identification number; the aggrieved person's citizenship
17 status or alien identification number; the aggrieved person's current employment
18 status, employer or place of employment; the identification number assigned to the
19 aggrieved person by the person's employer; the name of the aggrieved person's
20 parent or legal guardian; any identifying information of the aggrieved person's
21 depository account at a 'financial institution' or 'trust company,' as those terms are
22 defined in ORS 706.008, or a credit card account; the aggrieved person's signature
23 or a copy of the aggrieved person's signature; the aggrieved person's electronic
24 mail name, electronic mail signature, electronic mail address or electronic mail
account; any photographs of the aggrieved person; or the aggrieved person's date
of birth."

(Exs. X3, X5, X9)

8) On April 18, 2016, Respondents filed a document titled Acceptance of
Service. (Ex. X6)

9) On April 20, 2016, all Respondents jointly filed an answer through Courtney
Angeli, attorney at law. Respondents raised numerous affirmative defenses, including:

* * * * *

"5. There was no negligence by Stars or any of Respondents on which to
premise any theory of liability. Following the discovery of Toth's unauthorized,
criminal conduct, Stars engaged in heightened efforts to ensure that minors did not
access the premises. Immediately upon learning of the allegations related to
Aggrieved Person #1, Stars' ownership demanded that two separate club
employees examine any new applicant information. In addition, upon entry onto

1 the premises on any given day, a dancer was required to show identification, which
2 was recorded by door personnel.

3 ** * * *

4 "8. As to Aggrieved Person #2, who danced at Stars in Beaverton fewer
5 than six days, to the extent the claim is that she was harassed by a supervisor,
6 none of Respondents is liable because (1) there was no tangible employment
7 action taken against her; (2) Stars was unaware of Aggrieved Person #2's age or
8 any offensiveness of the environment to her in light of her age; (3) Stars was
9 reasonably diligent in ensuring that underage dancers did not perform at Stars
10 clubs and the Beaverton club specifically; (4) Stars took immediate and appropriate
11 corrective action by promptly reporting Aggrieved Person #2 to authorities as soon
12 as it learned of her potentially being underage; and/or (5) Aggrieved Person #2
13 unreasonably failed to take advantage of preventive opportunities for addressing
14 the conduct, in that she knowingly misrepresented her age and presented false
15 identification in violation of Oregon law to secure the opportunity to dance at Stars,
16 and in that she never reported to anyone at Stars that she was subject to
17 unwelcome conduct. OAR 839-0050-0030(5).

18 "9. As to Aggrieved Person #2, who danced at Stars in Beaverton fewer
19 than six days, to the extent the claim is that she was harassed by coworkers or
20 agents of Stars, none of Respondents are liable because they did not know nor
21 should they have known of any sexually harassing conduct and, as soon as Stars
22 had reason to believe that Aggrieved Person #2 was underage and might
23 potentially be offended or presumptively find any sexual conduct 'unwelcome,'
24 Stars notified authorities and excluded her from any further entry on the premises.
OAR 839-0050-0030(6).

"10. As to Aggrieved Person #2, who danced at Stars in Beaverton fewer
than six days, to the extent the claim is that she was harassed by non-employees
/patrons, none of Respondents are liable because they did not know nor should
they have known of any sexually harassing conduct and, as soon as Stars knew
that Aggrieved Person #2 was underage and might potentially be offended or
presumptively find any sexual conduct 'unwelcome,' Stars notified authorities and
excluded her from any further entry on the premises. OAR 839-0050-0030(7).

** * * *

"12. Respondents are not liable to Aggrieved Person #2 because no action
by an employer was directed at her 'because of sex,' and thus the basic
requirements of ORS 659A.030(1)(a) are not satisfied. The theory of liability
seems to be that Stars took insufficient steps to prevent minors from accessing the
premises, and that the presence of a minor on the premises of a gentlemen's club
is, by itself, an exposure of the individual to sexual harassment. This, however, is
a theory about employer conduct that is based on age, not sex. The fact that the

1 environment and nature of the entertainment is sexual does not mean that it is
2 inherently a hostile working environment, particularly as such entertainment
activities are Constitutionally protected in Oregon.

3 "13. Respondents are not liable to Aggrieved Person #2 because her
4 alleged exposure to the conditions of dancing at Stars was not unwelcome nor was
5 it subjectively offensive: She knowingly misrepresented her age and used false
6 identification to obtain access to the premises, did not object to the premises or
any conduct therein, and, on information and belief, sought and obtained access
to similar establishments prior to and after applying to be an adult entertainer at
Stars.

7 "14. Any unwelcome conduct experienced by Aggrieved Person #2 during
8 the six or so days she danced at Stars was not sufficiently severe or pervasive to
constitute a hostile working environment.

9 "15. Stars is not liable to Aggrieved Person #2 for any damages she
10 sustained because she took action that caused her to experience such conduct
11 and/or her damages should be eliminated or reduced for her failure to mitigate the
12 harm, both by presenting false identification to evade the mechanisms intended to
prevent her entry on the premises, and by failing to report to anyone at Stars that
she experienced unwelcome conduct or behavior. Respondents further deny that
any of them, or any conduct for which they are vicariously liable, caused the
amount of damages alleged."

13 (Ex. X7)

14 10) On April 28, 2016, the ALJ issued an interim order which stated:

15 "It has come to my attention that Respondents sent copies of the following
16 documents to me by email and hand delivery, but those documents were not sent
to the attention of BOLI's Contested Case Coordinator:

- 17 • Respondents' Request for Informal Discovery, Unopposed Motion
18 Requesting 60-Day Hearing Set Over, and Proposing a Case
Scheduling Conference;
- 19 • Answer and Defenses to Formal Charges and Notice of Hearing; and
- 20 • Motion to Dismiss.

21 "The Agency filed a Motion for Default on April 26, 2016, which asserts that
22 the Answer was not timely filed. The deadline for filing a response to that motion
is May 3, 2016. I will issue a ruling on the Agency's motion after the response is
23 filed, or the response time has passed, whichever occurs first.

1 "Because a ruling on the Motion for Default might also impact whether
2 Respondents' motions are considered to be on file with the forum, I will not be
3 ruling on those motions at this time. The administrative law judge is unable to
4 issue a ruling on motions unless they are filed with the forum. OAR 839-050-
5 0040(1); OAR 839-050-0020(15).

6 "The parties are reminded to direct all filings to the following address:

7 Bureau of Labor and Industries
8 ATTN: Contested Case Coordinator
9 1045 State Office Building,
10 800 N.E. Oregon Street, Portland, OR 97232-2162

11 **IT IS SO ORDERED"**

12 (Ex. X10)

13 11) The Agency filed a Motion for Default on April 26, 2016, asserting that
14 Respondents were in default because an Answer was not filed with BOLI's Contested
15 Case Coordinator by the due date of April 20, 2016. Respondents filed a response to the
16 Agency's motion on April 29, 2016, and asserted that the Answer was submitted for filing
17 on time at the correct address, although the envelope contained the name of the assigned
18 ALJ instead of the Contested Case Coordinator. The forum issued an interim order
19 regarding the Agency's motion on May 2, 2016, which stated, in pertinent part:

20 "[A] document is filed with the Forum either on the date the Forum receives
21 the document, or on the date postmarked on the properly addressed document,
22 whichever is earlier." OAR 839-050-0040(1). "'Forum' means the Administrative
23 Law Judge assigned to preside over the contested case proceeding and the
24 Commissioner or Deputy Commissioner who signs the final order.' OAR 839-050-
0020(15). The rule goes on to state that the address of the Forum is: 'Bureau of
Labor and Industries, ATTN: Contested Case Coordinator, 1045 State Office
Building, 800 N.E. Oregon Street, Portland, OR 97232-2162.'

"The envelope containing the Answer was sent to the correct street address
and included the name of the assigned ALJ (a person who is included in the
definition of the 'Forum'), but did not include the words 'Contested Case
Coordinator.' Nevertheless, the envelope containing the Answer was stamped:

1 'RECEIVED BY
2 CONTESTED CASE
COORDINATOR

3 April 20, 2016

4 BUREAU OF LABOR
5 AND INDUSTRIES'

6 "Under these circumstances, the Forum 'receive[d]' the Answer on that date
7 and it was timely filed. Therefore, the Agency's motion is DENIED. The Answer
will be placed in the Forum's file and the record will reflect that it was filed on April
8 20, 2016."

9 (Exs. X8, X13, X14)

10 12) After Respondents filed documents with BOLI's Contested Case
Coordinator duplicating documents previously sent to the attention of the ALJ, an interim
order was issued on May 4, 2016, which stated as follows:

11 "To avoid any potential confusion regarding the date of filing, this interim
12 order notifies the parties that the filing date of the following documents was April
13 29, 2016:

- 14 • Respondents' Request for Informal Discovery, Unopposed Motion
Requesting 60-Day Hearing Set Over, and Proposing a Case
Scheduling Conference
- 15 • Respondents' Motion to Dismiss.

16 "April 29, 2016, is the date that should be used for calculating the time for
17 responding to these motions."

18 (Ex. X15)

19 13) On May 6, 2016, the ALJ issued an Interim Order explaining the
requirements for filing motions and other documents, which notified the parties that all
20 documents needed to be submitted in writing to BOLI's Contested Case Coordinator. The
ALJ also issued an Interim Order requiring the parties to file case summaries which
21 identified witnesses and exhibits two weeks in advance of the date set for hearing. (Exs.
X19, X20)

22 14) The Agency filed a request for clarification of the ALJ's Interim Order re
23 Agency's Motion for Default on May 4, 2016. Respondents submitted a filing in opposition
to the request for clarification on May 5, 2016. On May 10, 2016, an interim order was
24 issued which stated, in pertinent part:

1 *** The Agency requested clarification as follows:

2 'The Agency requests that the Forum [provide] clarification and guidance
3 on filings addressed and mailed directly to an ALJ, and advise whether its
4 ruling in *Green Thumb* has been over-turned or remains good law. The
5 Agency also further requests that the Forum provide clarification as to
6 whether a document is "received" by the Forum when actually received by
 the Administrative Law Judge (or Commissioner or Deputy Commissioner),
 despite an administrative law judge's order expressly dictating otherwise, or
 whether a document is 'received' by the Forum only when stamped
 "Received by Contested Case Coordinator."

7 Agency Request for Clarification, pp. 8-9. Respondents submitted a response to
8 the Agency's request on May 5, 2016. The following addresses the questions
 raised by the Agency.

9 "1. The Ruling in *Green Thumb* Has Not Been Overruled and Remains Good
10 Law, But it Does Not Apply to the Facts at Issue in the Agency's Motion for
 Default.

11 "The *Green Thumb* case was not cited in the interim order ruling on the
12 Agency's motion for default because it does not apply to this situation. In an effort
13 to be brief, the interim order did not include a lengthy discussion of the ways in
14 which *Green Thumb* contrasts with the situation in this case. Upon review of the
 Agency's request, it seems that it would be helpful to elaborate on the differences
 between the situation in *Green Thumb* and this case. Thus, a description of how
 this case differs from *Green Thumb* is discussed below.

15 "First, the procedure for filing the document at issue in *Green Thumb*
16 (Exceptions to the Proposed Order) is governed by OAR 839-050-0380. That
 administrative rule does not apply to the filing of Respondent's Answer in this case.

17 "Second, the ruling in *Green Thumb* concerned whether the Agency had
18 demonstrated 'good cause' for an extension of time to file their Exceptions after
19 the due date had passed. The interim order in this case examined whether the
 Answer was filed with the Forum under OAR 839-050-0040 and OAR 839-050-
20 0020(15), not whether Respondents should be afforded an extension of time under
 OAR 839-050-0050.

21 "Third, the Agency attempted to file the document in *Green Thumb* by mail,
22 but it was (1) marked with insufficient postage, (2) 'not mailed to the address where
23 exceptions must be mailed,' and (3) not received by the Contested Case
24 Coordinator on the due date. By contrast, Respondents' Answer in this case was
 submitted by hand delivery and (1) arrived at the correct physical address on the
 due date, (2) was addressed to the ALJ, who is included in the definition of the
 'Forum,' and (3) a stamp on the envelope and on the document itself stated that it

1 was 'received' by the Contested Case Coordinator on the due date. Additionally,
2 the envelope containing the Acceptance of Service was marked in the same
3 manner as the envelope containing the Answer, and it was previously accepted for
4 filing. The combination of these unique factors²² demonstrated that the Answer
5 was filed on time with the Forum in accordance with the requirements of OAR 839-
6 050-0040 and OAR 839-050-0020(15).

7 "Finally, in *Green Thumb*, the 'written directions' that were not followed were
8 contained in the 'Exceptions Notice' which advised the parties of the requirements
9 of 'ORS chapter 183 and OAR 839-050-0380.' There is no indication that
10 additional instructions were added by the ALJ beyond the already applicable legal
11 requirements. Similarly, the Notice of Hearing in this case referenced the
12 applicable rules and advised the participants of their rights, as required by ORS
13 183.413 and 183.415. In this case, there was no order issued by the ALJ which
14 contained 'instructions' which differed from the applicable rules. Moreover, the
15 Notice of Hearing states that the Answer 'must be mailed or hand-delivered to the
16 Contested Case Coordinator' and it is undisputed that the Contested Case
17 Coordinator actually received the document, as evidenced by the 'received' stamp
18 on the envelope and the Answer itself, as opposed to the Exceptions in *Green
19 Thumb* which were not received. Based on the specific set of circumstances and
20 the wording of the applicable rules (which differed from the rule at issue in *Green
21 Thumb*), the Answer in this case was 'filed with the Forum' on the due date. For
22 this reason also, the ruling in the *Green Thumb* case did not affect the timeliness
23 of the Answer in this case.

24 "Put simply, *Green Thumb* involved a different type of document, different
administrative rules²³ and different facts than those at issue in the Agency's Motion
for Default. Thus, although the ruling in *Green Thumb* remains good law, it does
not apply to the situation in this case and, therefore, the motion for default was
denied.

"2. The Remainder of the Agency's Questions are Not at Issue in this Case.

"The ruling on the Agency's Motion for Default applied the relevant legal
authority to the specific facts at issue in that motion. The Agency's Request for
Clarification raises a number of questions that do not apply to the facts of this case,

²² Neither this ruling, nor the interim order ruling on the Agency's Motion for Default, is intended to set a
precedent establishing that a document is timely filed when only one of these factors exists. As explained
below, the ALJ is unable to issue a ruling on a hypothetical set of events.

²³ Notably, the rule for filing exceptions specifically requires the document to be filed "with the administrative
law judge *through the Contested Case Coordinator*." OAR 839-050-0380(4)(emphasis added). Similarly,
motions must be submitted to the ALJ "through the Contested Case Coordinator." OAR 839-050-0150.
The rules do not contain similar language regarding the filing on an Answer and the ALJ is unable to insert
language that has been omitted. See ORS 174.010.

1 and seem to be hypothetical situations that may or may not arise in the future.²⁴ It
2 is understandable that the Agency would like clarity on those matters. However,
3 the ALJ's role is limited to the 'consideration of all issues *properly before the*
4 *presiding officer in the case and the correct application of law to those facts.*' ORS
5 183.417(8) (emphasis added). Therefore, the ALJ is unable to issue a ruling on
6 matters not at issue in this case.

7 "Conclusion"

8 "For all the foregoing reasons, the Agency's Request for Clarification is
9 GRANTED IN PART, and DENIED IN PART as reflected in the discussion above."

10 (Exs. X16, X17, X21)

11 15) On May 12, 2016, a prehearing conference was held at the request of the
12 parties to discuss the case schedule. An interim order was issued on May 16, 2016,
13 regarding rulings made during the conference, which stated, in pertinent part:

14 " * * * After receiving input from the parties, the following rulings were made
15 regarding the case schedule:

- 16 • Unless a different time period is provided below or in a subsequent interim
17 order, all parties shall have 14 days to respond to all motions. This includes
18 any motions currently pending at this time.
- 19 • All discovery must be exchanged and any discovery motions must be filed by
20 July 29, 2016. The parties are encouraged to file motions earlier than this date
21 if it becomes clear that they are unable to reach an agreement on particular
22 issues.
- 23 • All dispositive motions, including motions for summary judgment and/or
24 motions to dismiss, must be filed no later than September 16, 2016.
- Responses to dispositive motions must be filed by October 7, 2016.
- Case summaries must be filed by October 25, 2016.
- The hearing in this matter is set to begin on Tuesday, November 8, 2016 at 9:00 a.m. The hearing will be in recess on Friday, November 11, 2016, due to the Veteran's Day holiday, and will resume Monday, November 14, 2016, until

24 It is understandable that the parties would like some clarity regarding these questions raised by the Agency. However, when situations are not directly addressed in BOLI's contested case rules, Final Orders or other applicable legal authority, they can only be addressed on a case-by-case basis by applying the existing rules to the facts of the case.

1 it concludes.

- 2 • The hearing will be held at the **Office of Administrative Hearings, located at**
3 **7995 S.W. Mohawk Street, Entrance B, Tualatin, Oregon**. Additionally, the
forum will use a court reporter to make the official record of the hearing.²⁵

4 (Exs. X11, X23)

5 16) On May 11, 2016, Respondents filed a motion to dismiss, remove or
6 transfer. Respondents also filed a "second" motion to dismiss, remove or transfer on May
7 24, 2016. The Agency responded to the motions on May 25, 2016. An interim order
ruling on Respondents' motions was issued on May 31, 2016, which stated as follows:

8 **"INTRODUCTION**

9 "On May 11, 2016, Respondents filed a Motion to Dismiss, Remove or
10 Transfer. Respondents filed a Second Motion to Dismiss, Remove or Transfer on
11 May 24, 2016. In both motions, Respondents assert that Commissioner Avakian is
not an impartial decision maker because he is the Complainant in this matter and has
made public statements about the case. Respondents also argue that BOLI's
prosecutorial and adjudicative roles were not adequately separated when the
12 Contested Case Coordinator signed a declaration relied upon in the Agency's Motion
for Default. For those reasons, Respondents contend that the matter should be
dismissed or, alternatively, the case should be removed or transferred to circuit court.

13
14 "The Agency filed a response to both motions on May 25, 2016. First, the
Agency states that the Deputy Commissioner, not BOLI's Commissioner, will be
issuing the Final Order in this matter. Second, the Agency argues that the actions of
15 the Contested Case Coordinator do not violate due process. Finally, the Agency
contends that there is no legal authority to transfer or remove the case to circuit court.

16 **"DISCUSSION**

17
18 "The matters raised in Respondents' motions all revolve around concerns that
there should be an unbiased decision maker and that there are inadequate procedural
19 due process protections. Procedural due process requires a decision maker to be
free of actual bias; Respondents have the burden of demonstrating an actual bias.
20 See *Teledyne Wah Chang v. Energy Facility Siting Council*, 298 Or 240, 262 (1985),
citing *Boughan v. Board of Engineering Examiners*, 46 Or App 287, 611 P.2d 670,
21 rev den 289 Or 588 (1980).

22
23

24 ²⁵ The ALJ may also make an electronic recording of the hearing, but the court reporter's transcript will be
the official record.

1 "Most of Respondents' arguments expressed concern about the fairness of the
2 Commissioner acting as both the Complainant and the person who would be issuing
3 the Final Order in this matter. In response, the Agency states that the Deputy
4 Commissioner, not Commissioner Avakian, issues Final Orders when a
5 Commissioner's Complaint has been filed. (Ex. 1 to Agency's Resp.); *In the Matter*
6 *of Blachana, LLC*, 32 BOLI 211 (2012) (BOLI's Commissioner filed the complaint
under ORS 659A.825(1)(b), then delegated the ultimate decision-making authority in
the case to the Deputy Commissioner, who signed and issued the Final Order). There
is no evidence on the record to suggest that the Deputy Commissioner has an actual
bias towards Respondents.

7 "Respondents also argue that BOLI's prosecutorial and adjudicative roles were
8 not adequately separated when the Contested Case Coordinator signed a declaration
9 in support of the Agency's Motion for Default, which was ultimately denied in an
10 interim order.²⁶ Respondents express concerns that the Contested Case Coordinator
11 'strongly and misleadingly implied that [she] had never personally received
Respondent's Answer, when in reality, *she had*.'²⁷ (Respondent's Motion, p. 5,
emphasis in original) Regardless of whether Respondents' characterization of the
Contested Case Coordinator's actions is correct or not, there is no evidence that she
acted with an actual bias towards Respondents when signing the declaration.
Moreover, the Contested Case Coordinator is not a decision maker in this matter.

12 "Accordingly, Respondents have not met their burden in establishing that the
13 decision maker in this case has an actual bias towards them. Therefore, both of their
motions are DENIED."

14 (Exs. X22, X24, X 25, X26)

15 17) On June 7, 2016, Respondents filed a motion seeking an extension of time
16 until June 20, 2016, to respond to request for informal discovery received from
17 Complainant. Respondents needed the additional time to obtain responses from several
18 individual Respondents who reside out-of-state. The Agency did not object. On June 8,
2016, the ALJ issued an interim order granting Respondent's request for extension of
time. Respondents filed a second unopposed motion seeking additional time to respond
to Complainant's request on June 14, 2016, which was granted in an interim order dated
June 15, 2016. (Exs. X28 - X31)

21 _____
22 ²⁶ Respondents assert that the Contested Case Coordinator is a "witness" in this case because she signed
23 a declaration in support of the Agency's motion for default. However, the Agency's motion for default was
denied and is no longer at issue.

24 ²⁷ Actually, the Contested Case Coordinator stamped "received" on an envelope addressed to the ALJ, not
the Contested Case Coordinator.

1 18) On June 23, 2016, Respondents filed a Motion for 60-Day Hearing Set Over
2 because one of their attorneys had a trial date that conflicted with the hearing and due to
3 the need for more time to review the volume of discovery that was produced to
4 Respondents by the Agency. The Agency timely filed an objection to the motion on July
5 5, 2016, asserting that Respondents' stated reasons did not constitute "good cause" for
6 a postponement. Respondents filed a "supplemental motion" on July 6, 2016, arguing
7 that the Agency's discovery responses were inadequate. On July 7, 2016, the ALJ issued
8 an interim order ruling on Respondents' motion which stated, in pertinent part:

9 "INTRODUCTION

10 "This matter was initially set for hearing to begin on August 2, 2016. On
11 April 29, 2016, Respondents filed an unopposed motion to postpone the hearing
12 by 60 days. A prehearing conference was held on May 12, 2016, to address the
13 postponement motion and other matters. Chief Administrative Prosecutor Jenn
14 Gaddis and Administrative Prosecutor Cristin Casey appeared on behalf of the
15 Agency. Attorneys Anthony Reiner and Joel Shapiro appeared on behalf of
16 Aggrieved Person # 1 and Aggrieved Person # 2. Attorneys Courtney Angeli and
17 Matt Scherer appeared on behalf of Respondents.

18 During the prehearing conference, the participants discussed the amount of
19 discovery, as well as conflicts with their work and personal schedules which could
20 impact their availability for a hearing in this case. Respondents' counsel indicated
21 that they had recently received approximately 17,000 pages of material from the
22 Agency. All of the scheduling conflicts were taken into consideration and the
23 hearing was rescheduled to begin on November 8, 2016. All parties indicated that
24 this date was acceptable and the only mention of a potential issue with the date
was that it was Election Day.

"* * *

"DISCUSSION

"Pursuant to OAR 839-050-0150(5), a party who seeks to postpone the
hearing must demonstrate 'good cause' to move the hearing date. The following
factors are to be considered when making this determination:

(A) Whether previous postponements have been granted;

(B) The timeliness of the request;

(C) Whether a participant has previously indicated it was prepared to
proceed;

(D) Whether there is a reasonable alternative to postponement; for
example, submitting a sworn statement of a witness; and

1 (E) The date the hearing was originally scheduled to commence.

2 OAR 839-050-0150(5)(a).

3 "The forum applies the above-referenced factors to this case as follows:

4 (A) The hearing in this matter was previously postponed once.

5 (B) The current postponement request is being made several months in
6 advance of the November 8, 2016, hearing date.

7 (C) Everyone who attended the prehearing conference held on May 12,
8 2016 -- including counsel for Respondents -- stated that they were prepared
9 to proceed with a hearing on November 8, 2016.

10 (D) There may be reasonable alternatives to address Respondents'
11 concerns about discovery short of postponing the hearing, e.g. extending
12 the current discovery deadline. It is unclear whether the parties have
13 thoroughly explored other options.

14 (E) The hearing was originally scheduled for August 2, 2016. Respondents'
15 request that the hearing be postponed until January 2017 is five months
16 after the original hearing date.

17 The following ruling takes these considerations into account.

18 "First, the trial conflict of Matthew Scherer, one of Respondents' attorneys,
19 does not constitute 'good cause' to move the hearing date. It appears that the
20 conflicting trial date was set prior to the prehearing conference held on May 12,
21 2016, and Respondents were given the opportunity to discuss all potential
22 scheduling conflicts at that time. In their supplemental motion, Respondents state
23 that the conflicting trial date 'had not been placed on Mr. Scherer's calendar at the
24 time of the prehearing conference.' Even if that is the case, the date conflict was
not brought to the forum's attention until the second postponement motion was
filed June 23, 2016. Therefore, Respondents have not demonstrated 'good cause'
for a postponement for this reason.

"Second, there is insufficient information on the record at this time to support
a showing of 'good cause' to postpone the hearing due to the volume of discovery
and/or discovery disputes. The volume of discovery was discussed at the
prehearing conference and the parties also indicated that they anticipated filing
discovery motions. These factors were taken into consideration when scheduling
case deadlines and the hearing date. Respondents' motion and supplemental
motion reference discovery disputes and their efforts to hire additional personnel
to manage the discovery. However, it is unclear whether these issues could have
been anticipated at the time of the prehearing conference. Importantly, an analysis

1 of 'good cause' involves a showing of 'an excusable mistake or a circumstance
2 over which the participant had no control.' OAR 839-050-0020(16). Respondents
3 have not sustained their burden of proof in showing that there is 'good cause' to
reset the hearing due to an 'excusable mistake' or new circumstances 'over which
[Respondents] had no control.'

4 "Respondents have the ability to file a discovery motion and/or a motion to
5 extend the discovery deadline if they believe that the Agency's discovery
6 responses are inadequate. Those options have not yet been explored and the
record is incomplete as to those potential issues. The record before the forum at
this time does not demonstrate 'good cause' to reschedule the hearing.
Respondents' motion and supplemental motion are DENIED."

7
8 (Exs. X32 – X35)

9 19) On July 20, 2016, the ALJ issued an interim order granting Respondents'
10 motion filed on July 19, 2016, seeking an extension of time to respond to requests for
informal discovery received from Complainant, which was not opposed by the Agency.
(Exs. X39, X40)

11 20) On July 15, 2016, the Agency submitted a Motion to Compel Respondents
12 to Conform Their Interrogatories to OAR 839-050-0200(6), asserting that "it remains
unclear to the Agency how many interrogatories Respondents have actually served." On
13 July 18, 2016, Respondents filed a Motion to Stay Briefing on Agency's Motion to Compel,
arguing that Respondents believed the issues in dispute were capable of resolution. On
14 July 29, 2016, Respondents submitted a timely response to the Agency's Motion to
Compel. The ALJ issued an interim order ruling on the Agency's motion on August 3,
2017, which stated, in pertinent part:

15
16 **"DISCUSSION AND RULING**

17 "OAR 839-050-0200 states: 'The administrative law judge has the discretion
18 to order discovery by a participant in an appropriate case.' At the outset, it is worth
noting that the motion filed by the Agency does not request that the ALJ issue an
19 order requiring Respondents to produce discovery. Rather, it appears more like a
protective order pursuant to OAR 839-050-0150(8) in which the ALJ makes a
predetermination as to whether information should be produced. It is not clear that
20 the ALJ has the authority to make a ruling along the lines of what the Agency
requests, essentially ruling in advance as to whether the informal discovery sent
to the Agency by Respondents meets the requirements of OAR 839-050-0200(6).
21

22 "Instead, BOLI's rules provide for the parties to 'informally' exchange
discovery without the involvement of the ALJ, and then to move for a motion to
23 compel 'formal' discovery. See 839-050-0200(1), (8). Since Respondents have
not yet filed a motion asking the forum to require the Agency to provide 'formal'
24 discovery, the parties are in the 'informal' phase of discovery. Thus, there is

1 nothing for the forum to rule on at this point. Accordingly, the Agency's motion to
2 compel is DENIED.

3 "Since Respondents filed a timely response to the Agency's motion, their
4 motion to stay briefing is moot and is, therefore, DENIED.

5 **"OBSERVATIONS AND SUGGESTIONS**

6 "In order to assist the parties in moving forward with discovery, it appears
7 that the parties could benefit from some observations, which are made solely for
8 the purpose of assisting the parties and do not constitute an order to provide
9 discovery.

10 "Because Respondents did not initially number their interrogatories and
11 some appear to contain compound questions, it is understandable that there is
12 some confusion between the parties. BOLI's rules do not specifically require
13 interrogatories to be numbered, but that can be useful in determining how many
14 have been issued.

15 "The response filed by Respondents is helpful in understanding
16 Respondents' perspective as to how many interrogatories were promulgated by
17 Respondents. All parties seem to agree that 175 interrogatories may be issued by
18 Respondents. Respondents present alternative calculations of the amount of
19 interrogatories they have promulgated as either 94 (using Respondents' method
20 of calculation) or 138 (the Agency's method). The record before the forum at this
21 time does not include a similar calculation from the Agency which disputes that
22 offered by Respondents. Even if one assumes that the interrogatories in
23 Respondents' first and second requests for informal discovery contained discrete
24 subparts (which does appear to be the case), then there were 138 issued prior to
Respondents' third request for informal discovery. Accordingly, it is difficult to
understand the Agency's refusal to answer additional interrogatories.
Nevertheless, since Respondents have not filed a motion to compel, the forum will
not issue an order requiring the Agency to respond. *In the Matter of Dr. Andrew
Engel, DMD, PC*, 32 BOLI 94, 97(2012) (declining to order that discovery be
provided when respondents had not filed a motion for discovery order). The forum
suggests the parties do the following:

- The parties should begin with the assumption that 138 interrogatories were
issued in Respondents' first and second informal requests. The first
interrogatory in the third request appears to be the 139th interrogatory.
(Unless briefing on a future motion to compel persuasively demonstrates
that 138 is the incorrect number of interrogatories in the first and second
informal request, the forum will assume that the third informal request began
with interrogatory 139.)

- At any time prior to the discovery motion deadline, Respondents may file a motion to compel the Agency to respond if they believe they have not received adequate responses. If necessary, Respondents may also file a motion requesting permission to issue additional interrogatories.
- In responding to a motion to compel filed by Respondents, the Agency should be prepared to offer an explanation as to why Respondents' calculations as to the number of interrogatories are incorrect. The Agency should also offer its own alternative calculation so that the forum has a more specific understanding as to why the Agency disagrees with Respondents' version.
- The parties should keep in mind that when the forum is ruling on motions requesting depositions, the forum must determine whether 'other methods of discovery are so inadequate that the participant will be substantially prejudiced by the denial of a motion to depose a particular witness.' OAR 839-050-0200(3). Accordingly, Respondents' ability to obtain information from interrogatories will likely be a factor in ruling on those motions.

The observations and suggestions above should not be considered a ruling from the forum, but are merely offered to assist the parties in moving forward. If it would be helpful, the ALJ can be available for another telephone conference to discuss the matter."

(Exs. X37, X38, X44, X47)

21) During a prehearing telephone conference held on July 18, 2016, the parties and the ALJ discussed potential modifications to the existing case deadlines. After the conference, the parties indicated by email that they had reached an agreement to modify the case schedule as follows:

07/25/16	All informal discovery requests exchanged
08/08/16	All responses to informal discovery requests due
08/15/16	Motions to Compel filed
08/22/16	Responses to Motions to Compel filed

The ALJ issued an interim order on July 27, 2016, adopting the revised schedule. (Ex. X42)

22) On August 22, 2016, the ALJ issued an interim order amending the interim order issued on August 2, 2016, which ruled on Respondents' Motion to Dismiss, filed on April 29, 2016. The Agency responded to the motion on May 5, 2016. On July 12, 2016, Respondents filed a supplemental memorandum in support of their motion to dismiss. The Amended Interim Order re Respondents' Motion to Dismiss stated, in pertinent part:

1 "DISCUSSION

2 *** **

3 "B. Motion to Dismiss Individual Respondents Named as Aiders and
4 Abettors

5 "Respondents also move to dismiss all of the individuals named as aiders
6 and abettors, arguing that the Formal Charges do not allege facts which indicate
7 how those Respondents aided or abetted the alleged harassment of the aggrieved
8 persons. In support of their argument, Respondents rely on cases interpreting
9 Oregon's Rules of Civil Procedure, which do not apply to this administrative
10 proceeding. Instead, OAR 839-050-0060(1)(b) contains the standard for the
sufficiency of a charging document and requires that a charging document contain
a 'short and concise statement of the matters that constitute the violation.' See
also ORS 183.415(3)(d) (adequate notice of an agency action must include a 'short
and plain statement of the matters asserted or charged'). Respondents have not
argued that the allegations in the Formal Charges fail to meet the applicable
standard.²⁸

11 "Therefore, Respondent's motion to dismiss all of the individuals named as
12 aiders and abettors is DENIED."

13 (Exs. X12, X18, X36, X47, X62, X74)

14 23) An interim order was issued on August 5, 2016, granting Respondents'
15 Motion to File Exhibit Under Seal and for a Protective Order, which was filed on August
16 3, 2016. The motion indicated that Exhibit D to Respondents' Motion to Dismiss, Abate,
17 Substitute and/or Postpone contains Personal Identifying Information as defined in the
18 forum's Interim Protective Order issued April 27, 2016. Specifically, Respondents
indicated that Exhibit D contains the names and copies of signatures of the Aggrieved
Persons. The Agency did not oppose the motion. The forum found that Respondents'
description of the information in Exhibit D was Personal Identifying Information as defined
in the forum's Interim Protective Order issued April 27, 2016. Accordingly, Respondents
received permission to file Exhibit D under seal. (Exs. X49, X51)

19 24) On August 8, 2016, an interim order was issued granting the Agency's
20 Motion for Protective Order Concerning Confidential Oregon Employment Department
21 Records, filed July 22, 2016, asserting that it intended to disclose documents Bates
numbered 019547-019830 ("OED Documents"). The Agency asserted that the

22 ²⁸ As with all BOLI contested cases, the participants may address whether the Formal Charges meet the
23 standard set forth in OAR 839-050-0060(1)(b) and ORS 183.415(3)(d) before a Final Order is issued. See,
24 e.g. *In the Matter of Hamilton, Grant and Leslie dba MacGregors*, 33 BOLI 209, 217 (2014) (examining
whether there was adequate notice in the charging document when determining whether prejudgment
interest could be awarded).

1 documents were confidential and exempt from disclosure pursuant to ORS 657.665(1).
2 Respondents did not oppose the motion. The ALJ's interim order stated, in pertinent part:

3 "The forum has reviewed [*in camera*] the OED Documents submitted by the
4 Agency and agrees that the OED Documents are confidential under ORS
5 657.665(1). Since there is not a discovery motion pending, the forum is not issuing
6 an interim order requiring that the OED Documents be produced. If/when the OED
7 Documents are produced, Respondents are prohibited from making the OED
8 Documents available or disseminating OED Documents to anyone other than
9 Respondents' legal counsel in this matter. At the conclusion of this matter, all
10 documents or electronic data containing OED Documents, whether or not found
11 relevant or admitted into evidence (including all copies of OED Documents) are to
12 be sealed within the records of this matter, returned to the Agency, or destroyed."

13 (Exs. X41, X54)

14 25) On August 9, 2016, Respondents filed two motions: (1) a Motion to Seal
15 and Designate as "Confidential" Exhibit D to Respondents' Response in Opposition to
16 Agency Motion to Compel Respondents to Conform Their Interrogatories to OAR 839-
17 050-0200(6); and (2) Motion to File Motion to Compel and Accompanying Exhibits Under
18 Seal and Designate as "Confidential." The motions indicated that these documents
19 contain Personal Identifying Information as defined in the forum's Interim Protective Order
20 issued April 27, 2016. The ALJ issued an interim order on August 11, 2016, which stated,
21 in pertinent part:

22 "Although the Agency's time for responding to these motions has not
23 passed, it appears that it will be beneficial to the parties to have a ruling issued on
24 this matter now so that documents can be served and filed. The Agency may still
file responses to these motions and this ruling may be revisited, if necessary.

"The forum finds that Respondents' description of the information in the
motions filed by Respondents on August 9, 2016, appears to be Personal
Identifying Information as defined in the forum's Interim Protective Order issued
April 27, 2016. Accordingly, Respondents have permission to file these documents
under seal and serve the same on the Agency subject to the Interim Protective
Order.

**"Any documents submitted for filing under seal should be placed in a
separate envelope with a label that prominently states: CONFIDENTIAL – TO
BE FILED UNDER SEAL."**

"Respondents' motion is GRANTED."

(Ex. X63)

1 26) On August 16, 2016, the forum issued an interim order ruling on
2 Respondents' motion to depose Det. Opitz, which was filed on July 29, 2016. The Agency
3 filed a response opposing the motion on August 5, 2016. Both parties provided
4 information to the forum on August 9, 2016, in response to the interim order of August 8,
5 2016. The forum's interim order stated, in pertinent part:

6 "In a BOLI Contested Case proceeding, the ALJ's authority to issue an
7 interim order allowing depositions is limited and is not as extensive as that provided
8 in civil rules of procedure governing trial court proceedings. See, e.g., ORCP 39A
9 ('any party may take the testimony of any person, including a party, by deposition
10 upon oral examination'); FRCP 30(a)(1) ('A party may, by oral questions, depose
11 any person, including a party, without leave of court,' subject to certain exceptions).
12 BOLI's administrative rule, OAR 839-050-0200(3), provides:

13 'Depositions are strongly disfavored and will be allowed only when the
14 requesting participant demonstrates that other methods of discovery are so
15 inadequate that the participant will be substantially prejudiced by the denial
16 of the motion to depose a particular witness.'

17 "Respondents assert that they would suffer substantial prejudice if they are
18 unable to depose Det. Opitz because (1) he was 'deeply involved in the
19 investigations related to both of the Aggrieved Persons'; (2) Respondents expect
20 that he will testify at the hearing; and (3) Respondents will not have the opportunity
21 to question him prior to the hearing and, because he is not a party, 'Respondents
22 are unable to discover this information through interrogatories or requests for
23 admission.' [They] also assert that they 'must have an adequate opportunity
24 before hearing to thoroughly question him about his recollection of the events,
much of which will not appear in documents subject to subpoena.'

 "In response to the interim order of August 8, 2016, Respondents indicated
that several efforts were made to speak to Det. Opitz informally. Although Det.
Opitz appeared to be willing to speak to Respondents informally, the Beaverton
City Attorney's office said that they would rather have any discussion with Det.
Opitz take place pursuant to a subpoena and a deposition.

 "In response to the interim order of August 8, 2016, the Agency provided
the following regarding Det. Opitz:

- Police reports authored by Det. Opitz re Aggrieved Person # 1 (Bates Nos. 017115-017144, 017251-017253, 017279-017285, 017292-017297)
- Police reports authored by Det. Opitz re Aggrieved Person # 2 (Bates Nos. 017173-017181)
- Police reports authored by others describing Det. Opitz's investigation activities
- Transcript of Trial Testimony of Det. Opitz in Moreno-Hernandez Trial (re Aggrieved Person # 1) (Bates Nos. 017769-017931)

- 1 • Courtroom Log for the Trial of Moreno-Hernandez (re Aggrieved Person #
2 1), reflecting that Det. Opitz testified under oath as follows:
 - 3 ○ From 10:57 a.m. – 11:59 a.m. on September 11, 2014 (Bates No.
4 000050)
 - 5 ○ From 1:23 p.m. – 1:46 p.m. on September 11, 2014 (Bates Nos.
6 000050-000051)
 - 7 ○ From 1:53 p.m. – 3:07 p.m. on September 11, 2014 (Bates Nos.
8 000051-000053)
 - 9 ○ From 3:19 p.m. - 3:35 p.m. on September 11, 2014 (Bates No.
10 000053)
- 11 • Audio Recording of Det. Opitz's testimony in the trial of Moreno-Hernandez
12 (re Aggrieved Person # 1) (Bates Nos. . 000281-000323)
- 13 • Transcript of Trial Testimony of Det. Opitz in Anthony Curry Trial (re
14 Aggrieved Person # 2) (Bates Nos. 018314-018377)
- 15 • Courtroom Log for the Trial of Anthony Curry (re Aggrieved Person # 2),
16 reflecting that Det. Opitz testified under oath as follows:
 - 17 ○ From 10:16 a.m. - 11:23 a.m. on June 2, 2015 (Bates No. 000394)
 - 18 ○ From 3:30 [p.m.] - 4:55 p.m. on June 4, 2013 (Bates Nos. 000388-
19 000389)
 - 20 ○ From 9:23 a.m. - 10:38 a.m. on June 5, 2015 (Bates Nos. 000391-
21 000392)
- 22 • Audio Recording of Det. Opitz's testimony in the trial of Anthony Curry (re
23 Aggrieved Person # 2) (Bates Nos. . 415-429, 597-615, 623-639)
- 24 • There are also references to videotaped interviews that Opitz participated
in, although it is not clear if Respondents were provided with a copy of those
interviews.

“A recent BOLI Final Order addressed a Respondents' motion to depose a witness who was not a complainant or aggrieved person. *See In the Matter of Klein, Melissa and Aaron dba Sweetcakes by Melissa* ('Sweetcakes'), 34 BOLI 102 (2015), *appeal pending*. In *Sweetcakes*, the forum found that Respondents did not demonstrate the need to depose the witness (Cheryl McPherson), stating:

“* * * Respondents are typically provided with notes from investigative interviews of witnesses. Neither the Agency nor Respondents have provided information as to whether that occurred in this case. However, unless Respondents did not receive the usual investigative notes of the Agency's interview with Cheryl McPherson or no such notes exist because McPherson was never interviewed, I deny Respondents' request to take her deposition.”

Id. at 151. There do not appear to be any BOLI Final Orders authorizing the deposition of a non-party witness.

“As illustrated above, the information provided to Respondents in this case (police reports and sworn testimony of Det. Opitz regarding both Aggrieved

Persons) was extensive and likely significantly more detailed than the 'usual investigative notes' discussed in *Sweetcakes*. Respondents have not articulated any specific information that is missing from the police reports and trial testimony that they need to obtain from Det. Opitz. Given the policy set forth in OAR 839-050-0200(3) disfavoring depositions and the precedent set in the *Sweetcakes* case, the forum is unable to conclude that Respondents will be 'substantially prejudiced' if they cannot depose Det. Opitz.

"Respondents' motion is DENIED."

(Exs. X46, X52, X53, X70)

27) On August 22, 2016, the forum issued an interim order ruling on Respondents' motion to depose AP1 and AP2, which was filed on July 29, 2016. The Agency filed a response opposing the motion on August 5, 2016. Both parties provided information to the forum on August 9, 2016, in response to the interim order of August 8, 2016. The forum's interim order stated, in pertinent part:

"In a BOLI contested case proceeding, the ALJ's authority to issue an interim order allowing depositions is limited and is not as extensive as that provided in civil rules of procedure governing trial court proceedings. See, e.g., ORCP 39A ('any party may take the testimony of any person, including a party, by deposition upon oral examination'); FRCP 30(a)(1) ('A party may, by oral questions, depose any person, including a party, without leave of court,' subject to certain exceptions). BOLI's administrative rule, OAR 839-050-0200(3), provides:

'Depositions are strongly disfavored and will be allowed only when the requesting participant demonstrates that other methods of discovery are so inadequate that the participant will be substantially prejudiced by the denial of the motion to depose a particular witness.'

"Respondents assert that they would suffer substantial prejudice if they are unable to depose the Aggrieved Persons because the amount of damages requested for each Aggrieved Person (\$4 million) 'necessarily implies the existence of harm that goes far beyond that suffered by most victims of employment discrimination.' Respondents describe the information they would need to obtain as follows:

'Respondents must have an adequate opportunity before hearing to fully ascertain not only the nature of the Aggrieved Persons' alleged experiences at Stars Cabaret & Steak House, but also how those experiences might have interacted with other contributing sources of physical and emotional harm that may have been present in their lives. To do this effectively, Respondents must have the opportunity to thoroughly question each Aggrieved Person about not only the events alleged in the Formal Charges, but also other potential events that may have affected the Aggrieved

1 Person' physical and emotional state, whether by contributing to the alleged
2 harm they suffered or by mitigating the damages they incurred. Such
3 events may have occurred not only during the time periods alleged in the
4 Formal Charges, but also before and after those periods, and Respondents
5 will be unable to fully assess the nature of the Aggrieved Persons' damages
6 without such an opportunity.'

7 "As indicated above, in order for respondents to demonstrate the need to
8 take a deposition, they must show that 'other methods of discovery are so
9 inadequate that the participant will be substantially prejudiced by the denial of the
10 motion to depose a particular witness.' OAR 839-050-0200(3). The forum has
11 previously noted that Respondents 'must first attempt to gain the information via
12 sworn statements through interrogatories.' *In the Matter of Blachana, LLC*, 32
13 BOLI 220, 224 (2013), *affirmed Blachana, LLC v. Bureau of Labor and Industries*,
14 273 Or App 806, 359 P3d 574 (2015). In *Blachana*, the forum stated that the
15 respondents could renew their motion to depose witnesses '[i]f the Agency is
16 uncooperative in responding to interrogatories or if Respondents can demonstrate
17 that the information it has obtained from the interrogatories will substantially
18 prejudice Respondents in the absence of a deposition * * *.' *Id.*

19 "Based on BOLI's rule and the *Blachana* precedent, it was necessary to
20 determine what discovery had been requested and exchanged on the issue of the
21 Aggrieved Persons' damages. Accordingly, an interim order was issued on August
22 8, 2016, asking Respondents to provide the forum with a 'copy of all interrogatories
23 and requests for admission that Respondents issued which address the issue of
24 damages, along with the Agency's answers to those interrogatories and requests
for admission.' In response, Respondents provided copies of Interrogatory Nos.
21, 22, 31-52, 57 and 135, along with the Agency's responses. Respondents also
provided copies of Request for Admission Nos. 1, 2, 22, 46, 83 and Requests for
Production Nos. 17 and 18, along with the Agency's responses to those requests.

"The interim order of August 8, 2016, also invited the Agency to submit
copies of police reports and transcripts that had been provided to Respondents in
discovery. In response to the forum's request, the Agency provided the following
documents:

- Police reports authored by Det. Opitz re Aggrieved Person # 1 (Bates Nos. 017115-017144, 017251-017253, 017279-017285, 017292-017297)
- Police reports authored by others describing Det. Opitz's investigation activities
- Transcript of Testimony of Aggrieved Person # 1 in Moreno-Hernandez Trial (Bates Nos. 017561-017608)
- Courtroom Log for the Trial of Moreno-Hernandez reflecting that Aggrieved Person # 1 testified under oath as follows:
 - From 1:49 p.m. – 2:11 p.m. on September 10, 2014 (Bates No. 000044)

- From 2:27 p.m. – 2:59 p.m. on September 10, 2014 (Bates Nos. 000045)
- Audio Recording of the testimony [of] Aggrieved Person # 1 in the trial of Moreno-Hernandez (Bates Nos. 000232-000244)
- Police reports authored by Det. Opitz re Aggrieved Person # 2 (Bates Nos. 017173-017181)
- Transcript of Trial Testimony of re Aggrieved Person # 2 in Anthony Curry Trial (Bates Nos. 018912-019035)
- Courtroom Log for the Trial of Anthony Curry reflecting that Aggrieved Person # 2 testified under oath as follows:
 - From 10:09 a.m. – 10:58 a.m. on June 4, 2015 (Bates No. 000385)
 - From 11:12 a.m. – 11:57 a.m. on June 4, 2015 (Bates Nos. . 000385-000386)
 - From 1:45 p.m. – 2:36 p.m. on June 4, 2015 (Bates Nos. 000386-000387)
- Audio Recording of the testimony of Aggrieved Person # 2 in the trial of Anthony Curry (Bates Nos. 000556-000576, 000578-000587)
- There are also references a videotaped **REDACTED** interview of Aggrieved Person # 2, although it is not clear if Respondents were provided with a copy of that interview.
- The documents also suggest that Respondents were provided with copies of medical records of the Aggrieved Persons.

“The information provided by the Agency is quite extensive and includes testimony and statements from both of the Aggrieved Persons about events that took place at the Beaverton Stars which are the subject of the Formal Charges. These documents also contain detailed, descriptive statements from each Aggrieved Party about their whereabouts and activities during the time period immediately before and after they were at the Beaverton Stars location. The amount of information provided in these documents is more detailed than what is usually exchanged in a BOLI civil rights case. Nevertheless, the forum recognizes that Respondents likely have a need for additional relevant information that was not covered in the criminal investigations and trials. Of the discovery requested by Respondents on the issue of damages, the Agency provided substantive answers (either in written narrative responses or by referring to documents produced in discovery) to Interrogatory Nos. 21, 22, 31-35, 37-41, and 43-51, but objected on the grounds of ‘overbreadth and relevance’ to Interrogatory Nos. 36 and 42, and objected to Interrogatory No57 on the basis of relevance.²⁹ The Agency also objected to Interrogatory Nos. 47, 52 and 135 on the grounds that they were ‘overbroad,’ along with other objections. The Agency answered Request for Admission Nos. 1, 22, 46 and 83, and indicated that it had provided all information

²⁹ The observations in this ruling are made solely for the purpose of ruling on Respondents’ motion requesting depositions. When ruling on the pending motions to compel filed August 15, 2016, the forum may conclude that additional discovery needs to be provided.

1 within its possession in response to Requests for Production Nos. 17 and 18.

2 "Respondents have adequately demonstrated that, before requesting
3 depositions, they first attempted to obtain discovery through the use of
4 interrogatories. Accordingly, the forum must determine if (1) the Agency was
5 'uncooperative' in its responses or (2) 'if Respondents can demonstrate that the
6 information it has obtained from the interrogatories will substantially prejudice
7 Respondents in the absence of a deposition.' *Blachana*, 32 BOLI at 224.

8 **"Analysis of the Agency's Level of Cooperation"**

9 "The Agency responded to virtually all of the requests about damages, aside
10 from the objections noted above. The interrogatories with objections and the
11 responses to those interrogatories were:

12 'Interrogatory³⁰ 36: With respect to each condition of Aggrieved Person #1
13 state any other causes of emotional distress in the Aggrieved Person's life.'
14 *'The Agency objects to this interrogatory, on the basis of overbreadth and*
15 *relevance.'*

16 'Interrogatory 42: With respect to each condition of Aggrieved Person #2
17 state any other causes of emotional distress in the Aggrieved Person's life.'
18 *'The Agency objects to this interrogatory, on the basis of overbreadth and*
19 *relevance.'*

20 'Interrogatory 47: Identify any person whom believed [sic] to have
21 knowledge or information concerning each type of element of damages and
22 relief for which the Agency intends to seek relief at the trial of this case, and
23 state separately which respect [sic] to each such person any and all facts,
24 knowledge and information each such person is believed to have, on behalf
of Aggrieved Person #1.'

*'The Agency objects to this interrogatory as overbroad. To the extent that
the Agency can accurately respond: all persons with knowledge of the case,
that the Agency has been able to identify, are contained within the
previously provided discovery. To the extent that Respondents are
requesting the Agency's potential witness list in this matter, the Agency has
not begun constructing such a list at this time. At such time as the list is
finalized, ordered to be provided to a case summary, the Agency will provide
its witness list.'*

'Interrogatory 52: Identify any person whom believed [sic] to have
knowledge or information concerning each type of element of damages and

³⁰ The quoted language is taken from the Agency's responses provided to the forum by Respondents, and possibly may differ from the exact wording of Respondents' original interrogatories.

1 relief for which the Agency intends to seek relief at the trial of this case, and
2 state separately which respect [sic] to each such person any and all facts,
3 knowledge and information each such person is believed to have, on behalf
4 of Aggrieved Person #2.'

5 *'The Agency objects to this interrogatory as overbroad. To the extent that*
6 *the Agency can accurately respond: all persons with knowledge of the case,*
7 *that the Agency has been able to identify, are contained within the*
8 *previously provided discovery. To the extent that Respondents are*
9 *requesting the Agency's potential witness list in this matter, the Agency has*
10 *not begun constructing such a list at this time. At such time as the list is*
11 *finalized, ordered to be provided to a case summary, the Agency will provide*
12 *its witness list.'*

13 'Interrogatory 57: Did Aggrieved Person #1 receive restitution from Steven
14 Toth pursuant to O.R.S. § 137.106? If so, provide all information relevant
15 to such restitution.'

16 *'The Agency objects to this interrogatory, on the basis of relevance. Any*
17 *restitution ordered in connection to the criminal liability of Respondents'*
18 *manager Steve Toth, for his crimes against Aggrieved Person #1, is*
19 *irrelevant to the liability of Respondents or damages sought for their*
20 *unlawful conduct against Aggrieved Person #1.'*

21 'Interrogatory 135: Describe all verbal communications between either of
22 the Aggrieved Persons and any employee of the Agency – including the
23 Commissioner – between 2012 and the present regarding or referring to the
24 possibility that the Aggrieved Persons would file and civil or administrative
action. The description should include the date, persons present, and the
substance of the conversation.'

'The Agency objects to this interrogatory as to form because it contains
multiple subparts.

'(a) Aggrieved Person #1: The Agency objects to this request as it is
overbroad, vague and requests information not generally relevant to
the factual matters alleged in this case. The agency objects to this
request to the extent it requests information subject to work-product
and/or attorney-client information.

'(b) Aggrieved Person #2: The Agency objects to this request as it is
overbroad, vague and requests information not generally relevant to
the factual matters alleged in this case. The agency objects to this
request to the extent it requests information subject to work-product
and/or attorney-client information.'

22 *"Almost all of the objections to these interrogatories include an objection on*
23 *the basis of relevance. 'Any discovery request must be reasonably likely to*
24 *produce information that is generally relevant to the case.'* OAR 839-050-0200(7).

1 "Interrogatory Nos. 36 and 42 request information about other causes of
2 emotional distress. The forum has previously found that medical records close in
3 time to the events in the case 'contained information generally relevant to the issue
4 of Complainant's entitlement to damages for emotional, mental, and physical
5 suffering.' *In the Matter of Dr. Andrew Engel, DMD, PC*, 32 BOLI 94, 97 (2012).
6 Accordingly, Respondents are entitled to information about other potential causes
7 of emotional distress in the time period near the events in this case. For purposes
8 of this case and due to the ages of the Aggrieved Persons, the forum finds that
9 Respondents are entitled to responses within the time period of one year prior to
10 the events in the Formal Charges up until present day.

11 "Interrogatory Nos. 47 and 52 ask for the names of witnesses to the
12 damages sought by Aggrieved Person #2. 'Discovery may include but is not
13 limited to * * * [d]isclosure of names and addresses of witnesses expected to testify
14 at the hearing.' OAR 839-050-0200(2)(a). Accordingly, Respondents are entitled
15 to this information and should not have to wait until the Agency files its case
16 summary two weeks prior to the hearing.

17 "Interrogatory No. 57 requests information about whether Aggrieved Person
18 # 1 received restitution from Steven Toth, the former employee at Stars who was
19 convicted of crimes relating to his conduct involving Aggrieved Person # 1.
20 Accordingly, because Toth's conviction may relate to his conduct while acting as
21 an employee at the Beaverton Stars, the requested information satisfies the
22 relevancy standard set forth in OAR 839-050-0200(7).

23 "The Agency's objections to Interrogatory No. 135 are consistent with the
24 forum's precedent establishing that communications with the Agency's staff about
the prosecution of a case are privileged. See *In the Matter of Columbia
Components, Inc.*, 32 BOLI 257, 265 (2013) (notes made by the case presenter³¹
were privileged under the work product doctrine); *In the Matter of Logan
International, Ltd.*, 26 BOLI 254, 257-58 (2005) (the Agency did not have to
produce interviews specifically conducted by the case presenter). Thus,
Respondents are not entitled to this information.

18 "As discussed above, Respondents were entitled to receive some
19 information that the Agency refused to provide. **Accordingly, the Agency is**
20 **instructed to provide responses to Interrogatory Nos. 36, 42,³² 47 and 52 no**
21 **later than August 30, 2016.** If the Agency fails to provide those responses,
22 Respondents may request a telephone conference to address the matter and, if
23 necessary, this ruling will be revisited.

24 ³¹ Currently, administrative prosecutors perform the duties that used to be carried out by case presenters.

³² Answers to Interrogatories 36 and 42 can be restricted to the time period of one year prior to the events
described in the Formal Charges up until the present day.

1 **"Analysis of Whether There is Substantial Prejudice**

2 "Respondents also assert that they will be substantially prejudiced if they
3 are not able to question the Aggrieved Persons about their damages in a
4 deposition, relying on the case of *Melissa and Aaron Klein dba Sweetcakes by*
5 *Melissa* ('Sweetcakes'), 34 BOLI 102 (2015), *appeal pending*. In *Sweetcakes*, the
Agency had identified '178 types of alleged harm' in response to the respondents'
interrogatories. *Id.* at 195. The ALJ made the following ruling regarding the
respondents' request to depose the complainants:

6 'I have reviewed prior BOLI Final Orders in which damages were
7 awarded for emotional and mental suffering and find that *this case stands*
8 *well apart from all its predecessors in the exhaustive list of harms alleged*
9 *by Complainants for which the Agency seeks damages. No other case*
10 *comes even remotely close.* In defending themselves, Respondents have
11 a right to inquire into each type of harm alleged by Complainants to
12 determine the extent of the harm and whether Complainants' physical,
mental, and emotional suffering was caused, at least in part, if not in whole,
by events and circumstances that were unrelated to Aaron Klein's ORS
659A.403 violation. *Based on the sheer number and variety of types of*
alleged harm, there is no practical way Respondents can accomplish an
effective inquiry using interrogatories. I find that Respondents will be
substantially prejudiced if they are not allowed to depose Complainants.'

13 *Id.* at 196 (emphasis added). By contrast, in this case there is a 'practical way' for
14 the Agency to provide information about the alleged harm by answering the
15 interrogatories discussed above. Additionally, Respondents have already
16 received documents with testimony and statements describing how the Aggrieved
17 Persons were living and their activities immediately before and after their work at
the Beaverton Stars. Accordingly, if the Agency supplements their interrogatory
answers as instructed above, Respondents should not be substantially prejudiced
if they are unable to depose the Aggrieved Persons.

18 "Given the policy set forth in OAR 839-050-0200(3) disfavoring depositions
19 and BOLI's precedential cases, the forum is unable to conclude that
Respondents will be 'substantially prejudiced' if they cannot depose Aggrieved
Person # 1 and Aggrieved Person # 2.

20 "With the exception of the instruction to supplement the answers to
21 Interrogatories 36, 42, 47 and 52 set forth above, Respondents' motion is
DENIED."

22 (Exs. X45, X52, X53, X73)

23 28) On August 10, 2016, Respondents filed a document titled Motions to
24 Reconsider the Denial of Respondents' Motions to Dismiss so the Tribunal May Apply the

1 Correct Legal Standards. The filing consisted of two motions: (1) a motion requesting
2 reconsideration of the forum's interim order of August 1, 2016; and (2) a motion requesting
3 reconsideration of the forum's interim order of May 31, 2016. The Agency submitted a
timely response to the motions on August 24, 2016. On August 25, 2016, an interim order
was issued which stated as follows, in pertinent part:

4 **"MOTION NO. 1 RE INTERIM ORDER ISSUED AUGUST 1, 2016**

5 "Respondents first assert that the interim order of August 1, 2016,
6 incorrectly cites to a portion of the case of *OR-OSHA v. CBI Servs., Inc.*, 356 Or
7 577, 341 P3d 701 (2014), which discusses the interpretation of a delegative
8 statutory term, not an inexact term. On August 22, 2016, the forum issued an
9 Amended Interim Order replacing the *OR-OSHA* citations with references to
10 *Bergerson v. Salem-Keizer Sch. Dist.*, 341 Or 401, 411, 144 P3d 918 (2006), which
states that an agency's interpretation of inexact terms is to be reviewed 'to ensure
that it is consistent with the legislature's intent.' The forum also notes that the
correct standard was used and discussed in the Interim Order of August 1, 2016,
as follows:

11 "To determine the meaning which should be given to this inexact phrase,
12 this forum must ascertain what the Legislature meant by using it." *In the*
13 *Matter of Mini-Mart Foodstores, Inc., an Oregon Corporation, Respondent*,
3 BOLI 262, 274 (1983). See also *J.R. Simplot*, 340 Or at 198 (an
interpretation of an inexact term is reviewed "to determine whether the
agency's action effectuated the legislative policy, as evidenced by the text
and context of the statute.')."

14
15 The interim order of August 1, 2016, examined legislative intent to ascertain the
16 meaning of the statute. Since the applicable administrative rule is consistent with
that intent, no further modifications to the Interim Order of August 1, 2016, are
necessary.

17 "Second, Respondents also assert that the Interim Order of August 1, 2015,
18 is inconsistent with the Final Order in the case of *In the Matter of Maltby Biocontrol,*
Inc., 33 BOLI 121 (2014). As Respondents point out, one of the complaints in
19 *Maltby* was filed by Oregon's Attorney General. The administrative rule at issue in
this case (OAR 839-003-0100(2)) applies to complaints filed by the Commissioner,
20 not the Attorney General. Accordingly, the forum's ruling does not conflict with the
Maltby decision.

21 "Third, Respondents assert that the phrase 'in the same manner as' is an
22 exact term, not an inexact term. However, none of the cases cited by Respondents
indicate that it is an exact term, meaning that it has 'relatively precise meaning.'
23 *Springfield Educ. Ass'n v. Springfield Sch. Dist. No. 19*, 290 Or 217, 223, 621 P2d
547, 558 (1980). For the reasons set forth in the Interim Order of August 1, 2016,
24 the forum declines to change its ruling that the statute contains an 'inexact' term.

1 “The remainder of Respondents’ arguments essentially request that the
2 forum reconsider the analysis of the applicable statutes and regulation. For the
3 reasons explained in detail in the interim order of August 1, 2016 and the amended
interim order of August 22, 2016, the forum declines to change its ruling.

4 “Motion No. 1 is DENIED.

5 **“MOTION NO. 2 RE INTERIM ORDER ISSUED MAY 31, 2016**

6 “Motion No. 2 asks the forum to reconsider the Interim Order of May 31,
7 2016, denying Respondents’ motion to dismiss, transfer or remove this matter due
8 to the risk of ‘bias and prejudgment.’ The vast majority of this motion appears to
9 question the Agency’s evidence that the Deputy Commissioner will be issuing the
Final Order in this case. However, the arguments are merely speculative and the
forum declines to revisit its analysis in the interim order of May 31, 2016.

10 “The only new evidence put forth by Respondents is in the form of an email
11 from the Deputy Commissioner to members of BOLI’s staff with the subject line
12 ‘Additional coverage regarding Stars/pimps.’ Ex. A to Respondent Motion, p. 1.
The email has links to two news articles from oregonlive.com summarizing criminal
proceedings for individuals convicted of crimes based on their conduct involving
the Aggrieved Persons.

13 “Procedural due process requires a decision maker to be free of actual bias;
14 Respondents have the burden of demonstrating an actual bias. *See Teledyne*
15 *Wah Chang v. Energy Facility Siting Council*, 298 Or 240, 262 (1985), *citing*
16 *Boughan v. Board of Engineering Examiners*, 46 Or App 287, 611 P.2d 670, *rev*
17 *den* 289 Or 588 (1980). The forwarded news articles indicate that some of the
18 criminal conduct occurred at one of Respondents’ establishments, but do not
discuss further details related to the Formal Charges. The email forwarding these
articles does not establish that the Deputy Commissioner is ‘personally biased
against’ Respondents. *See Samuel v. Bd. of Chiropractic Examiners*, 77 Or App
53, 60, 712 P2d 132, 137 (1985), *rev den*, 300 Or 704 (1986), and *rev den*, 302 Or
36 (1986).

19 “Accordingly, the motion is also DENIED.

20 **“NOTICE TO THE PARTIES**

21 “The forum notes that both the Agency and Respondents have each
22 submitted ancillary documents with titles such as ‘supplemental’ motion, motion
23 for ‘clarification,’ or motion to ‘reconsider.’ Although the forum has made
24 substantive rulings on some of these motions, those filings are not specifically
covered in BOLI’s contested case rules and have started to impact the efficiency
of the contested case process. Absent unusual circumstances, the forum does not

1 intend to entertain these extraneous motions in the future and will issue interim
2 orders denying such motions before the opposing party responds. If the parties
3 disagree with a ruling made in an interim order, they will have the opportunity to
address that by filing exceptions after the Proposed Order is issued pursuant to
OAR 839-050-0380."

4 (Exs. X62, X79, X80)

5 29) On August 3, 2016, Respondents filed a document titled Motion to Dismiss,
6 Abate, or Substitute Parties and/or Postpone the Action. The Agency filed a timely
7 response opposing the motion on August 17, 2016. All of the arguments raised in
8 Respondents' motions relate to civil complaints filed in Washington County Circuit Court
on July 7, 2016, on behalf of AP1 and AP2. Each Complaint for Damages was filed by a
guardian ad litem on behalf of each aggrieved person. On August 25, 2016, the ALJ
issued an interim order which stated, in pertinent part:

9 **"MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

10 "Respondents contend that BOLI's jurisdiction over the matters alleged in
11 the Formal Charges 'ceased when the Aggrieved Persons filed their civil actions
in Washington County.' Their motion is based on several provisions of ORS
chapter 659A and various other legal and public policy doctrines.

12 **"A. ORS 659A.820(3)**

13 "Respondents first cite to ORS 659A.820(3)(a) which states that 'a
14 complaint may not be filed under *this section* if a civil action has been commenced
in state or federal court alleging the same matters.' (Emphasis added).
15 Immediately prior to the subpart cited by Respondents, the statute makes clear
that it pertains to '[a]ny person claiming to be aggrieved by an alleged unlawful
16 practice.' ORS 659A.820(2). It does not apply to complaints filed by the
Commissioner, which are governed separately by ORS 659A.825. Accordingly,
17 because the complainant in this case is the Commissioner, ORS 659A.820 does
not apply and this argument requires no further analysis.³³

18 **"B. ORS 659A.870(1)**

19 "Respondents next assert that ORS 659A.820(3)(a) should be extended to
20 apply to Commissioner's complaints, relying on ORS 659A.870(1). That statute
specifically refers to 'the right of the person to file a complaint with the
21 Commissioner * * * under ORS 659A.820 with respect to the matters alleged in the
civil action.' ORS 659A.870(1). The statute specifically mentions ORS 659A.820
22

23 ³³ Because this provision does not apply to ORS 659A.825, it is not necessary to examine whether the
24 Washington County cases "alleg[e] the same matters" as the Formal Charges.

1 (BOLI complaints filed by aggrieved persons) without reference to ORS 659A.825
2 (BOLI complaints filed by the Commissioner). Notably, when the legislature
3 wanted to refer to both ORS 659A.820 and 659.825 together, it did so. See, e.g.,
4 ORS 659A.835(1) ('after the filing of any complaint under ORS 659A.820 or
5 659A.825, the Commissioner * * * may investigate the complaint'); ORS
6 659A.835(2) ('The Commissioner shall commence an investigation of any
complaint filed under ORS 659A.820 or 659A.825 * * *'); ORS 659A.855(2)(a) (if a
complaint 'is filed under ORS 659A.820 or 659A.825' alleging housing law
violations, the commissioner may assess specified civil penalties). The forum will
not insert ORS 659A.825 into 659A.830(1) when the legislature omitted it. ORS
174.010.

7 "Accordingly, the forum finds Respondents' argument is without merit and
8 declines to extend the reach of ORS 659A.820(3)(a).

9 **"C. ORS 659A.830(1)"**

10 "Respondents next rely on ORS 659A.830(1), asserting that 'the legislature
11 intended for a BOLI administrative action to cease upon the filing of a civil action
12 'alleging the same matters' *even if the administrative action was filed before the*
13 *civil action.*' (Emphasis in original). The portion of ORS 659A.830(1) relied on by
14 Respondents states:

15 [A]ll authority of the Commissioner of the Bureau of Labor and Industries to
16 conduct investigations or other proceedings to resolve a complaint filed
17 under ORS 659A.820 ceases upon the filing of a civil action by the
18 complainant alleging the same matters that are the basis of the complaint
19 under ORS 659A.820.'

20 As previously stated, the legislature clearly referred to both ORS 659A.820 and
21 659A.825 when it intended to do so. However, it did not include ORS 659A.825 in
22 ORS 659A.830(1). Therefore, as previously stated, the forum will not insert ORS
23 659A.825 into ORS 659A.830(1) when it has been omitted.

24 **"D. Legislative Policy of ORS Chapter 659A"**

"Respondents also argue that 'dismissal is still appropriate because the
relevant provisions in ORS Chapter 659A paint a clear picture of legislative policy:
The legislature did not wish for civil and BOLI proceedings to proceed
simultaneously.' The forum agrees that the legislature appeared to have that
intention with respect to claims filed by aggrieved persons under ORS 659A.820.
However, as previously stated, ORS 659A.825 is conspicuously absent from all of
the statutes which seek to prevent BOLI administrative proceedings and court
cases from proceeding simultaneously.

1 **"E. 'Public Policy and a Host of Legal Doctrines'**

2 "Respondents contend that allowing this case to 'continue would violate
3 public policy and a host of legal doctrines developed to prevent duplicative litigation
4 and multiple recoveries.' Importantly, Respondents' motion to dismiss is based on
5 an alleged lack of subject matter jurisdiction, which is grounds for dismissal under
6 OAR 839-050-0150(1)(a). It is questionable as to whether these legal theories
actually deprive the forum of subject matter jurisdiction and, thus, for that reason
the motion may not be well taken. Notwithstanding the procedural basis for the
motion, the theories discussed in Respondents' motion do not support dismissal
for the reasons described below.

7 **"1. Res Judicata**

8 "[C]laim preclusion" as that term is typically used, formerly known as *res*
9 *judicata*, prohibits a party from relitigating a cause of action against the same
10 defendant involving the same factual transaction as was litigated in the previous
11 adjudication, *if there has been a final judgment in the first action.*' *Krisor v. Lake*
Cty. Fair Bd., 256 Or App 190, 193, 302 P3d 455, 457 (2013), *rev den*, 354 Or 61
12 (2013) (emphasis added), quoting *Drews v. EBI Companies*, 310 Or 134, 139-40,
795 P2d 531 (1990). Because no final judgment has been entered involving the
parties in this case, this doctrine does not apply.³⁴

13 **"2. Election of Remedies**

14 "The Oregon Supreme Court has recently explained the doctrine of election
of remedies as follows:

15 "* * * The doctrine of election between inconsistent remedies does not
16 require an election before the entry of judgment. A party need only choose
17 between or among inconsistent remedies, not inconsistent claims or
18 theories of recovery. ORCP 16 C; *see also Colonial Leasing Co. v. Tracy*,
276 Or 1193, 1196-97, 557 P.2d 639 (1976) ("Ordinarily an election is not
19 made until a judicial proceeding has gone to judgment on the merits.").
Accordingly, subject to the limiting principles discussed above, when it
comes to an election of remedies, *the choice is for the claimant to make,*
not the defendant or the court.'

20 *Evergreen W. Bus. Ctr., LLC v. Emmert*, 354 Or 790, 805-06, 323 P3d 250 (2014)
21 (emphasis added). Since the doctrine only applies to a choice a claimant may
22 need to make *before* judgment has been entered, it does not bar the current case

23 ³⁴ Because there has been no final judgment, it is not necessary to examine the other elements needed to
24 establish claim preclusion.

1 from proceeding.³⁵

2 "3. Prohibition Against Multiple Recoveries

3 "The theory of preventing multiple recoveries is a policy decision which is
4 sometimes adopted by the legislature, and sometimes it is not. See, e.g. *White v.*
5 *Jubitz Corp.*, 347 Or 212, 223, 219 P3d 566, 572 (2009) (when interpreting ORS
6 31.580, the court concluded that 'the legislature did not preclude "double recovery"
7 of collateral source benefits'). When such a provision is not included in the statute,
8 it will not be inserted. ORS 174.010.

9 "4. Another Action Pending

10 "Respondents assert that there is a requirement to dismiss an action 'when
11 another action is pending involving the same or substantially the same parties,
12 subject matter, and remedies.' However, the cases cited by Respondents do not
13 support their contention that this doctrine 'requires' dismissal of an administrative
14 proceeding. On the contrary, the Oregon Court of Appeals has supported the
15 continuation of administrative proceedings when there is related litigation, noting:

16 'The [Insurance] Division has primary responsibility for enforcing the
17 Insurance Code, a duty which prompted the present proceeding. Any type
18 of violation which involves two or more entities is likely to result in
19 associated litigation between them, which in turn is likely to encompass
20 issues which are before the Division in an administrative proceeding. In
21 some instances, the party seeking recovery may rely on the very statute
22 upon which administrative disciplinary action is predicated. *To hold that the*
23 *Division had to delay its consideration of the disciplinary matter pending the*
24 *outcome of related litigation would frustrate its enforcement efforts.* The
existence of a prior court determination that a statute was or was not
violated could complicate the agency's task significantly. Logically, it makes
more sense to stay the litigation pending interpretation of a statute by the
agency with expertise in the area, which is charged by law with construing,
expressing and enforcing legislative policy. We conclude that there was no
abuse of discretion in denying the stay in this case.'

19 *Bonneville Auto. Ins. Co. v. Ins. Div., Dep't of Commerce*, 53 Or App 440, 448, 632
20 P2d 796, 801 (1981). See also *Sawyer v. Real Estate Agency*, 268 Or App 42, 55,
21 342 P3d 104, 112 (2014) (upholding administrative law judge's denial of motion to
22 stay proceedings to revoke real estate license while criminal charges were
23 pending). Therefore, this argument also does not support the dismissal of the
24 Formal Charges.

23 ³⁵ Because the doctrine does not apply, it is not necessary to examine the Agency's argument that the
24 Formal Charges and the July 2016 lawsuit "involve neither the same parties, nor the same claims."

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"5. Avoiding Inconsistent Judgments

"Respondents also contend that there is a risk of inconsistent judgments if the Washington County civil lawsuits are amended to add employment claims on behalf of the Aggrieved Persons. That has not yet occurred. Moreover, any actions in the trial court are outside of the jurisdiction of this forum and would need to be raised in that venue. Accordingly, this argument also does not warrant dismissal of the Formal Charges.

"6. Exhaustion of Administrative Remedies

"The Oregon Supreme Court has recently described this legal theory as follows: 'The doctrine of exhaustion of administrative remedies generally provides that "[j]udicial review is only available after the procedure for relief within the administrative body itself has been followed without success.'" *Miller v. City of Portland*, 356 Or 402, 418, 338 P3d 685, 694 (2014), quoting *Mullenaux v. Dept. of Revenue*, 293 Or 536, 539, 651 P2d 724 (1982). Since the doctrine applies to 'judicial review' by a court, not administrative contested case proceedings, it is not grounds for dismissing the Formal Charges in this case.

"7. Conclusion

"Since the various legal theories discussed above do not support dismissal, the motion to dismiss is DENIED.

"MOTION TO ABATE

"As previously stated, the Oregon Court of Appeals has held that administrative proceedings need not be stayed pending related court proceedings. See, e.g. *Sawyer*, 268 Or App at 62 (ALJ did not err in denying petitioner's motion to stay the proceedings while a criminal case was pending); *Bonneville Auto. Ins. Co.*, 53 Or App at 448 (finding no abuse of discretion in denial of motion to stay Insurance Division case).

"Accordingly, this motion is also DENIED.

"MOTION TO SUBSTITUTE PARTIES

"Respondents also request that the forum remove the Commissioner as the complainant in this case and add the Aggrieved Persons pursuant to OAR 839-050-0170(1) and (5). In support of this argument, Respondents point to various legal theories, such as 'real parties in interest' and the right to due process, but provide no legal briefing to show how those theories might require the forum to substitute parties.

1 "Respondents also assert that they have a right to a jury trial under Article
2 I, § 17 of the Oregon Constitution, citing to the recent case of *Horton v. OHSU*,
359 Or 168, __ P3d __ (2016). Article I, § 17 of the Oregon Constitution states:

3 'In all civil cases the right of Trial by Jury shall remain inviolate.'

4 In *Horton*, the Oregon Supreme Court addressed the issue of a cap on damages
5 and overruled precedent which 'impose[d] a substantive limit on the legislature's
6 authority to define the elements of a claim or the extent of damages available for
7 a claim.' *Id.* at __, *38. However, more applicable to this case, the court affirmed
8 cases that 'establish that Article I, section 17 guarantees litigants a procedural right
9 to have a jury rather than a judge decide those common-law claims and defenses
that customarily were tried to a jury when Oregon adopted its constitution in 1857,
as well as those claims and defense that are "of like nature." In other words, if a
cause of action allowed for a jury trial at the time the Oregon Constitution was
adopted in 1857, then a person filing the same cause of action in court today also
has a right to a jury trial.

10 "However, there is no constitutional entitlement to a jury trial as to the claims
11 under ORS chapter 659A alleged in the Formal Charges, as there was not a right
12 to a jury trial for such claims in 1857. See, e.g., *Wincer v. Ind. Paper Stock Co.*,
48 Or App 859, 863, 618 P.2d 15 (1980). See also *In the Matter of Emerald Steel*
13 *Fabricators, Inc.*, 27 BOLI 242, 245 (2006),³⁶ citing *Cornelison v. Seabold*, 254 Or
401, 404-05 (1969); *Williams v. Joyce*, 4 Or App 482, 501 (1971); *Fred Meyer, Inc.*
14 *v. Bureau of Labor of Labor and Industries*, 39 Or App 253 (1979); *City of Portland*
v. Bureau of Labor and Industries, 61 Or App 182, 193 (1982).

15 "Accordingly the motion to substitute is also DENIED.

16 "MOTION TO POSTPONE

17 "Respondents also move to postpone the case, essentially relying on most
of the arguments made in support of their other motions.

18 "For the same reason discussed in ruling on the motions above, the motion
19 to postpone is also DENIED."

20 (Exs. X50, X71, X81)

21 30) The Agency filed a Motion to Compel discovery on August 15, 2016.
22 Respondents responded to the motion on August 22, 2016. On September 7, 2016, an
interim order was issued ruling on the motion which stated, in pertinent part:

23 ³⁶ This Final Order was reversed on other grounds in *Emerald Steel Fabricators, Inc. v. Bureau of Labor*
24 *and Industries*, 348 Or 159, 230 P3d 518 (2010).

1 **"LEGAL STANDARD**

2 'Any discovery request must be reasonably likely to produce information
3 that is generally relevant to the case.' OAR 839-050-0200(7). In determining
4 whether a request is 'reasonably likely to produce information that is generally
5 relevant to the case,' it is important to take note of the claims and defenses in the
6 case.

7 *"Discrimination/Sexual Harassment*

8 "The Formal Charges allege that 'Respondents' discriminated against both
9 Aggrieved Persons in compensation or in terms, conditions or privileges of
10 employment, in violation of ORS 659A.030(1)(b), *former* and *current* OAR 839-
11 005-0021(1), (2) and *former and current* OAR 839-005-0030. ORS 659A.030(1)(b)
12 states, in pertinent part, that it is an unlawful employment practice '[f]or an
13 employer, because of an individual's * * * sex * * * to discriminate against the
14 individual in compensation or in terms, conditions or privileges of employment.'
15 OAR 839-005-0021 states:

16 '(1) Employers are not required to treat all employees exactly the
17 same, but are prohibited from using sex as the basis for employment
18 decisions with regard to hiring, promotion or discharge; or in terms,
19 conditions or privileges of employment such as benefits and compensation.

20 '(2) Discrimination because of sex includes sexual harassment,
21 discrimination based on pregnancy, childbirth and medical conditions and
22 occurrences related to pregnancy and childbirth.'

23 OAR 839-005-0030 states:

24 'Sexual Harassment in Employment

 '(1) Sexual harassment is unlawful discrimination on the basis of sex and
 includes the following types of conduct:

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

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

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

1 '(b) Any unwelcome verbal or physical conduct that is sufficiently severe or
2 pervasive to have the purpose or effect of unreasonably interfering with
work performance or creating a hostile, intimidating or offensive working
environment.

3
4 '(2) The standard for determining whether harassment based on an
individual's sex is sufficiently severe or pervasive to create a hostile,
intimidating or offensive working environment is whether a reasonable
5 person in the circumstances of the complaining individual would so perceive
it.

6
7 '(3) Employer proxy: An employer is liable for harassment when the
harasser's rank is sufficiently high that the harasser is the employer's proxy,
for example, the respondent's president, owner, partner or corporate officer.

8
9 '(4) Harassment by Supervisor plus Tangible Employment Action: An
employer is liable for sexual harassment by a supervisor with immediate or
successively higher authority over an individual when the harassment
10 results in a tangible employment action that the supervisor takes or causes
to be taken against that individual. A tangible employment action includes
11 but is not limited to the following:

12 '(a) Terminating employment, including constructive discharge;

13 '(b) Failing to hire;

14 '(c) Failing to promote; or

15 '(d) Changing a term or condition of employment, such as work assignment,
work schedule, compensation or benefits or making a decision that causes
16 a significant change in an employment benefit.

17 '(5) Harassment by Supervisor, No Tangible Employment Action: When
sexual harassment by a supervisor with immediate or successively higher
18 authority over an individual is found to have occurred, but no tangible
employment action was taken, the employer is liable if:

19 '(a) The employer knew of the harassment, unless the employer took
20 immediate and appropriate corrective action.

21 '(b) The employer should have known of the harassment. The division will
find that the employer should have known of the harassment unless the
22 employer can demonstrate:

23 '(A) That the employer exercised reasonable care to prevent and promptly
correct any sexually harassing behavior; and
24

1 (B) That the aggrieved person unreasonably failed to take advantage of
2 any preventive or corrective opportunities provided by the employer or to
otherwise avoid harm.

3 (6) Harassment by Co-Workers or Agents: An employer is liable for sexual
4 harassment by the employer's employees or agents who do not have
5 immediate or successively higher authority over the aggrieved person when
the employer knew or should have known of the conduct, unless the
employer took immediate and appropriate corrective action.

6 (7) Harassment by Non-Employees: An employer is liable for sexual
7 harassment by non-employees in the workplace when the employer or the
8 employer's agents knew or should have known of the conduct unless the
9 employer took immediate and appropriate corrective action. In reviewing
such cases the division will consider the extent of the employer's control
and any legal responsibility the employer may have with respect to the
conduct of such non-employees.

10 (8) Withdrawn Consent: An employer is liable for sexual harassment of an
11 individual by the employer's supervisory or non-supervisory employees,
12 agents or non-employees, even if the acts complained of were of a kind
previously consented to by the aggrieved person, if the employer knew or
should have known that the aggrieved person had withdrawn consent to the
offensive conduct.

13 (9) When employment opportunities or benefits are granted because of an
14 individual's submission to an employer's sexual advances, requests for
15 sexual favors, or other sexual harassment, the employer is liable for
unlawful sex discrimination against other individuals who were qualified for
but denied that opportunity or benefit.'

16 *"Aiding and Abetting"*

17 "The Formal Charges allege that all of the individual Respondents 'aided,
18 abetted, incited, compelled and/or coerced acts forbidden under ORS chapter
19 659A, specifically the unlawful practices alleged here, and [are] individually liable
for violations alleged herein as an aider and abettor pursuant to ORS
659A.030(1)(g).'

20 "ORS 659A.030(1)(g) provides that it is an unlawful employment practice
21 '[f]or any person, whether an employer or an employee, to aid, abet * * * the doing
22 of any of the acts forbidden under this chapter or to attempt to do so.' 'Person'
23 includes 'individuals.' ORS 659A.001(9)(a). 'Aiding and abetting, in the context of
an unlawful employment practice, means to help, assist, or facilitate the
24 commission of an unlawful employment practice, promote the accomplishment
thereof, help in advancing or bring it about, or encourage, counsel or incite as to

1 its commission.' *In the Matter of Maltby Biocontrol, Inc*, 33 BOLI 121, 151 (2014)
2 (internal citations omitted).

3 **"ANALYSIS OF THE AGENCY'S MOTION**

4 ***"Agency's First Informal Request for Discovery***

5 **"INTERROGATORIES FOR RESPONDENT FREHOO, INC.**

6 ***"Discovery Requested and Objection:***

7 'INTERROGATORY NO. 3: Describe any and all circumstances in which a
8 person under the age of 18 was or may have been on any premises, owned
9 or operated by Respondents, between 2012 and the present.

10 'RESPONSE: Frehoo objects to this interrogatory on multiple grounds.
11 First, insofar as this interrogatory seeks information about the presence of
12 underage individuals at properties or business other than the one (Stars
13 Cabaret & Steak House) in which BOLI claims Aggrieved Person #1 or #2
14 worked, it is not reasonably likely to produce information that is generally
15 relevant to the case. Second, the request calls for Frehoo to speculate
16 about how a minor "may have been" on the premises of Stars Cabaret &
17 Steak House, which is not reasonably likely to produce information that is
18 generally relevant to the case. Third, because the Formal Charges allege
19 only sex discrimination and include no claim for age discrimination or any
20 other claim for which age is a material element, this interrogatory seeks
21 information that is not reasonably likely to produce information that is
22 generally relevance to the case. Subject to and without waiving these
23 objections, Frehoo incorporates by reference its responses to Interrogatory
24 No. 2, above, and Interrogatory No. 9, below.'

17 ***"Analysis and Ruling:***

18 "In its motion, the Agency asserts that this information is relevant because
19 any minors present at or employed in 'Respondents' places of business' may have
20 also been subjected to sexual harassment in the workplace. Respondents make
21 two primary arguments in response. First, they assert that discovery regarding
22 'minors' and age-related questions are irrelevant to the allegations of sex
23 discrimination. Second, they object to discovery about any Stars-related entities
24 other than Freehoo/Beaverton,³⁷ which is the only corporate Respondent named
in the case.

37 In this document, "Freehoo/Beaverton" refers to Respondent Freehoo, Inc. dba Stars Cabaret & Steak House, Inc., which conducted business in Beaverton, Oregon.

1 “The Aggrieved Persons were minors at the time of the events alleged in
2 the Formal Charges, and their status as minors is a focus of the Agency’s
3 allegations. Accordingly, this question is relevant for that reason. However, the
4 interrogatory was directed only to Freehoo and there are no other corporate
5 entities or establishments named in this case. Accordingly, Freehoo/Beaverton is
6 directed to answer this interrogatory, but may limit its response to
7 Freehoo/Beaverton.

8 **“B. INTERROGATORIES FOR RESPONDENT PAMELA COLBURN**

9 *“Discovery Requested and Objection:*

10 ‘INTERROGATORY NO. 5: Describe the nature of your relationship with
11 each named respondent, including but not limited to whether the
12 relationship was business, romantic, and/or sexual?’

13 ‘RESPONSE: Respondent Colburn objects to this request as overbroad and
14 as seeking information that is not reasonably likely to produce information
15 that is generally relevant to this case. If the Agency narrows this request so
16 that it relates to the claims and allegations regarding Aggrieved Person #1
17 or Aggrieved Person #2, Respondent Colburn who does not participate in
18 any manner in the operation of Stars Cabaret & Steak House—will consider
19 responding further.’

20 *“Analysis and Ruling:*

21 “Colburn is identified in the Formal Charges as an owner of
22 Freehoo/Beaverton. More specifically, the Agency indicates in its motion that
23 Colburn owns shares of corporations that own Freehoo/Beaverton. With the
24 exception of Herkenrath, who is identified as a ‘manager’ at Freehoo/Beaverton
and Stars-Bridgeport, it appears that the other individual Respondents are also
owners of either Freehoo/Beaverton or another Stars-branded entity.

 “Respondents argue that this request seeks highly personal, irrelevant
information. The Agency asserts that this information is relevant to show a
systematic practice of sexual harassment in the workplace and because there has
been evidence of ‘Respondent-owners having romantic relationships with
employees.’ Since all of the named individual Respondents are either owners or
a manager, it is not clear how a romantic or sexual relationship between these
individuals is pertinent to this case, which involves alleged harassment of the
Aggrieved Persons, who performed as dancers. Accordingly, the Agency’s
request for this information is DENIED.

“Discovery Requested and Objection:

 ‘INTERROGATORY NO. 6: Describe any and all romantic and/or sexual

relationships that took place between you and any employee or independent contractor affiliated with Respondents, including the name of the individual, the dates of the relationship, and the individual's role in Respondents' business.

'RESPONSE: Respondent Colburn objects to this request as overbroad, failing to describe the information sought without sufficient specificity to allow for a meaningful response, and as seeking information that is not reasonably likely to produce information that is generally relevant to this case. Respondent Colburn has never met Aggrieved Person #1 or #2, and there is no allegation that she had or attempted to have a romantic or sexual relationship with either of them. If the Agency narrows this request so that it relates to the claims and allegations regarding Aggrieved Person #1 or Aggrieved Person #2, Respondent Colburn—who does not participate in any manner in the operation of Stars Cabaret & Steak House—will consider responding further.'

"Analysis and Ruling:

"Respondents' objection that the request is overbroad is well taken. However, if an individual Respondent had a sexual relationship with a dancer at Freehoo/Beaverton during the time periods of the events in the case, that may be evidence of the workplace culture at Freehoo/Beaverton. Thus, it is reasonably likely to produce information that is generally relevant to the allegations of aiding and abetting in that it may show if a Respondent 'helped, assisted, or facilitated the commission of an unlawful employment practice, promoted the accomplishment thereof, helped in advancing or bringing it about, or encouraging, counsel or inciting as to its commission.' *Maltby*, 33 BOLI at 151.

"Accordingly, Colburn³⁸ is directed to answer whether she had a romantic or sexual relationship with an employee or independent contractor at Freehoo in the years 2012-2014.

"C. INTERROGATORIES FOR RESPONDENT LISA HEINZMAN-MYERS

"Discovery Requested and Objection:

'INTERROGATORY NO. 5: Describe the nature of your relationship with each named respondent, including but not limited to whether the relationship was business, romantic, and/or sexual?

'RESPONSE: Respondent Heinzman-Myers objects to this request as overbroad and as seeking information that is not reasonably likely to produce information that is generally relevant to this case. If the Agency

³⁸ As indicated below, this ruling applies to each Interrogatory No. 6 directed to the individual Respondents.

1 narrows this request so that it relates to the claims and allegations regarding
2 Aggrieved Person #1 or Aggrieved Person #2, Respondent will consider
3 responding further. Subject to these objections, Respondent Heinzman-
Myers states that she has never been employed by Stars Cabaret & Steak
House and has never had any active role in its operation.'

4 *"Analysis and Ruling:*

5 "See Analysis and Ruling as to Colburn Interrogatory No. 5, which is
6 incorporated herein in its entirety.

7 *"Discovery Requested and Objection:*

8 'INTERROGATORY NO. 6: Describe any and all romantic and/or sexual
9 relationships that took place between you and any employee or
independent contractor affiliated with Respondents, including the name of
the individual, the dates of the relationship, and the individual's role in
Respondents' business.

10 'RESPONSE: Respondent Heinzman-Myers objects to this request as
11 overbroad and as seeking information that is not reasonably likely to
12 produce information that is generally relevant to this case. Respondent
Heinzman-Myers has never met Aggrieved Person #1 or #2, and there is
13 no allegation that she had or attempted to have a romantic or sexual
14 relationship with either of them. If the Agency narrows this request so that
it relates to the claims and allegations regarding Aggrieved Person #1 or
15 Aggrieved Person #2, Respondent Heinzman-Myers—who does not
participate in any manner in the operation of Stars Cabaret & Steak
House—will consider responding further. Without waiving and subject to
16 these objections, Respondent Heinzman-Myers states that she has never
been employed by Stars Cabaret & Steak House and has never had any
active role in its operation.'

17 *"Analysis and Ruling:*

18 "See Analysis and Ruling as to Colburn Interrogatory No. 6, which is
19 incorporated herein in its entirety.

20 **"D. INTERROGATORIES FOR RESPONDENT JON HERKENRATH**

21 *"Discovery Requested and Objection:*

22 'INTERROGATORY NO. 5: Describe the nature of your relationship with
23 each named respondent, including but not limited to whether the
relationship was business, romantic, and/or sexual.

1 'RESPONSE: Respondent Herkenrath objects to this request as overbroad
2 and as seeking information that is not reasonably likely to produce
3 information that is generally relevant to this case. If the Agency narrows
4 this request so that it relates to the specific allegations and claims regarding
the alleged employment of Aggrieved Person #1 or Aggrieved Person #2 at
Stars Cabaret & Steak House, Mr. Herkenrath will consider responding
further.'

5 *"Analysis and Ruling:*

6 "See Analysis and Ruling as to Colburn Interrogatory No. 5, which is
7 incorporated herein in its entirety."

8 *"Discovery Requested and Objection:*

9 'INTERROGATORY NO. 6: Describe any and all romantic and/or sexual
10 relationships that took place between you and any employee or
11 independent contractor affiliated with Respondents, including the name of
the individual, the dates of the relationship, and the individual's role in
Respondents' business.

12 'RESPONSE: Respondent Herkenrath objects to this request as overbroad
13 and as seeking information that is not reasonably likely to produce
14 information that is generally relevant to this case. There is no allegation
15 that Mr. Herkenrath had or attempted to have a romantic or sexual
16 relationship with either Aggrieved Person #1 or #2; the allegations about
17 Aggrieved Person #2's interactions with Mr. Herkenrath as described in Mr.
18 Lynch's notes of her interview (Bates Nos. 001032-1041) do not describe
19 him having behaved inappropriately towards her or anyone else. She does
not describe, for example, him using his management authority coercively
(Q: Did you tell him what times you wanted to work? A: Yes. She would ask
him if she could come in and Jon would say yes.") Aggrieved Person #2
also describes that she is not aware of any managers dating dancers. If the
Agency narrows this request so that it relates to the allegations concerning
conduct by Respondent Herkenrath toward Aggrieved Person #1 or
Aggrieved Person #2, Respondent will consider responding further.'

20 *"Analysis and Ruling:*

21 "See Analysis and Ruling as to Colburn Interrogatory No. 6, which is
22 incorporated herein in its entirety.
23
24

1 **"E. INTERROGATORIES FOR RESPONDENT RANDY KAISER**

2 *"Discovery Requested and Objection:*

3 'INTERROGATORY NO. 3: When did you first learn about Aggrieved
4 Person #1's employment, or alleged employment, at Stars-Beaverton?

5 'RESPONSE: Prior to the Agency's charge of discrimination, Respondent
6 Kaiser had not had any discussion in which anyone contended that
7 Aggrieved Person #2 was "employed" by Stars Cabaret & Steak House.'

8 *"Analysis and Ruling:*

9 "The Agency requested that a response be provided as to Aggrieved Person
10 #1, instead of Aggrieved Person #2. After the Agency filed its motion,
11 Respondents amended this response to correct a typographical error. Therefore,
12 this request is now moot.

13 *"Discovery Requested and Objection:*

14 'INTERROGATORY NO. 5: Describe the nature of your relationship with
15 each named respondent, including but not limited to whether the
16 relationship was business, romantic, and/or sexual?

17 'RESPONSE: Respondent Kaiser objects to this request as overbroad and
18 as seeking information that is not reasonably likely to produce information
19 that is generally relevant to this case. If the Agency narrows this request so
20 that it relates to the allegations concerning conduct by Respondents toward
21 Aggrieved Person #1 or Aggrieved Person #2, Respondent Kaiser will
22 consider responding further.'

23 *"Analysis and Ruling:*

24 "See Analysis and Ruling as to Colburn Interrogatory No. 5, which is
25 incorporated herein in its entirety.

26 *"Discovery Requested and Objection:*

27 'INTERROGATORY NO. 6: Describe any and all romantic and/or sexual
28 relationships that took place between you and any employee or
29 independent contractor affiliated with Respondents, including the name of
30 the individual, the dates of the relationship, and the individual's role in
31 Respondents' business.

32 'RESPONSE: Respondent Kaiser objects to this request as overbroad and
33 as seeking information that is not reasonably likely to produce information
34 that is generally relevant to this case. To his knowledge, Respondent

1 Kaiser has never met Aggrieved Person #1 or #2, there is no allegation that
2 he had or attempted to have a romantic or sexual relationship with either of
3 them, and Aggrieved Person #1 was never, in any event, an "employee or
4 independent contractor affiliated with Respondents." If the Agency narrows
this request so that it relates to the allegations concerning conduct by
Respondents toward Aggrieved Person #1 or Aggrieved Person #2,
Respondent will consider responding further.'

5 *"Analysis and Ruling:*

6 "See Analysis and Ruling as to Colburn Interrogatory No. 6, which is
7 incorporated herein in its entirety.

8 **"F. INTERROGATORIES FOR RESPONDENT TODD MITCHELL**

9 *"Discovery Requested and Objection:*

10 'INTERROGATORY NO. 3: When did you first learn about Aggrieved
Person #1's employment, or alleged employment, at Stars-Beaverton?

11 'RESPONSE: Prior to the Agency's charge of discrimination, Respondent
12 Mitchell had not had any discussion in which anyone contended that
Aggrieved Person #2 was "employed" by Stars Cabaret & Steak House.'

13 *"Analysis and Ruling:*

14 "See Analysis and Ruling as to Kaiser Interrogatory No. 3, which is
15 incorporated herein in its entirety.

16 *"Discovery Requested and Objection:*

17 'INTERROGATORY NO. 5: Describe the nature of your relationship with
each named respondent, including but not limited to whether the
relationship was business, romantic, and/or sexual?

18 'RESPONSE: Respondent Mitchell objects to this request as overbroad and
19 as seeking information that is not reasonably likely to produce information
20 that is generally relevant to this case. If the Agency narrows this request so
that it relates to the allegations concerning conduct by Respondents toward
21 Aggrieved Person #1 or Aggrieved Person #2, Respondent Mitchell will
consider responding further.'

22 *"Analysis and Ruling:*

23 "See Analysis and Ruling as to Colburn Interrogatory No. 5, which is
24 incorporated herein in its entirety.

1 *"Discovery Requested and Objection:*

2 'INTERROGATORY NO. 6: Describe any and all romantic and/or sexual
3 relationships that took place between you and any employee or
4 independent contractor affiliated with Respondents, including the name of
 the individual, the dates of the relationship, and the individual's role in
 Respondents' business.

5 'RESPONSE: Respondent Mitchell objects to this request as overbroad and
6 as seeking information that is not reasonably likely to produce information
7 that is generally relevant to this case. To his knowledge, Respondent
8 Mitchell has never met Aggrieved Person #1 or #2, and there is no
 allegation that he had or attempted to have a romantic or sexual relationship
9 with either of them. If the Agency narrows this request so that it relates to
 the allegations and claims regarding Aggrieved Person #1 or Aggrieved
 Person #2, Respondent will consider responding further.'

10 *"Analysis and Ruling:*

11 "See Analysis and Ruling as to Colburn Interrogatory No. 6, which is
 incorporated herein in its entirety.

12 **"G. INTERROGATORIES FOR RESPONDENT JEFF STRUHAR**

13 *"Discovery Requested and Objection:*

14 'INTERROGATORY NO. 3: When did you first learn about Aggrieved
15 Person #1's employment, or alleged employment, at Stars-Beaverton?

16 'RESPONSE: Prior to the Agency's charge of discrimination, Respondent
17 Mitchell had not had any discussion in which anyone contended that
 Aggrieved Person #2 was "employed" by Stars Cabaret & Steak House.'

18 *"Analysis and Ruling:*

19 "See Analysis and Ruling as to Kaiser Interrogatory No. 3, which is
 incorporated herein in its entirety.

20 *"Discovery Requested and Objection:*

21 'INTERROGATORY NO. 5: Describe the nature of your relationship with
22 each named respondent, including but not limited to whether the
 relationship was business, romantic, and/or sexual?

23 'RESPONSE: Respondent Struhar objects to this request as overbroad and
24 as seeking information that is not reasonably likely to produce information
 that is generally relevant to this case. If the Agency narrows this request so

1 that it relates to the allegations concerning conduct by Respondents toward
2 Aggrieved Person #1 or Aggrieved Person #2, Respondent Struhar will
consider responding further.'

3 *"Analysis and Ruling:*

4 "See Analysis and Ruling as to Colburn Interrogatory No. 5, which is
5 incorporated herein in its entirety.

6 *"Discovery Requested and Objection:*

7 'INTERROGATORY NO. 6: Describe any and all romantic and/or sexual
8 relationships that took place between you and any employee or
9 independent contractor affiliated with Respondents, including the name of
the individual, the dates of the relationship, and the individual's role in
Respondents' business.

10 'RESPONSE: Respondent Struhar objects to this request as overbroad and
11 as seeking information that is not reasonably likely to produce information
12 that is generally relevant to this case. To his knowledge, Respondent
13 Struhar has never met Aggrieved Person #1 or #2, and there is no allegation
that he had or attempted to have a romantic or sexual relationship with
either of them. If the Agency narrows this request so that it relates to the
claims regarding conduct by Aggrieved Person #1 or Aggrieved Person #2,
Respondent will consider responding further.'

14 *"Analysis and Ruling:*

15 "See Analysis and Ruling as to Colburn Interrogatory No. 6, which is
16 incorporated herein in its entirety.

17 **"H. REQUESTS FOR ADMISSIONS**

18 *"Discovery Requested and Objection:*

19 'REQUEST NO. 2: Admit that Respondents made no changes in policy or
20 procedure with regard to verifying the age of dancers, at any other club than
the Beaverton club, after they learned of Aggrieved Person #2's abuse in
the Stars-Beaverton.

21 'RESPONSE: Respondents object to this request as not reasonably likely
22 to produce information that is generally relevant to the case insofar as the
23 request seeks age-based information; the Formal Charges allege only sex
24 discrimination, include no claim for age discrimination or any other claim for
which age is a material element, and do not allege any unlawful employment
practices that occurred after they learned Aggrieved Person #2's true age.
Respondents further object that Frehoo operates no clubs other than Stars

1 Cabaret & Steak House in Beaverton, and Stars Cabaret & Steak House is
2 the only club where any events relevant to the Formal Charges are alleged
3 to have occurred. For these reasons and based on these objections,
4 Respondents decline to respond to this RFA.'

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11 *"Analysis and Ruling:*

12 "The Agency asserts that this request is relevant because it has 'alleged the
13 sexual harassment of two minors in Respondents' workplace' and age verification
14 is relevant. Respondents object to providing responses as to 'establishments other
15 than those where the Aggrieved Persons allegedly worked.' All parties
16 acknowledge that there were other establishments with adult entertainment that
17 included the name 'Stars' and there was some common ownership. However, the
18 record does not contain sufficient information about the relationship between
19 Freehoo/Beaverton and other Stars-named businesses to help the forum
20 understand whether they all operate under the same policies with the same
21 leadership and/or management. Accordingly, the record does not establish that
22 an answer to this request for admission is 'reasonably likely to produce information
23 that is generally relevant to the case.'

24 *"Discovery Requested and Objection:*

'REQUEST NO. 25: Admit Respondent Jeff Struhar has acted in a
managerial capacity inside a Stars establishment while intoxicated or under
the influence of illegal drugs.

'RESPONSE: Respondents object to this request as not reasonably likely
to produce information that is generally relevant to the case. Respondents
further object to this request as seeking information outside of the Agency's
jurisdiction; the Oregon Liquor License Commission and criminal
prosecutors, not the Bureau of Labor and Industries, have jurisdiction over
such matters. If the Agency narrows this request so that it relates to the
claims and allegations regarding Aggrieved Person #1 or Aggrieved Person
#2, Respondent Struhar—who was not alleged to have been present inside
Stars Cabaret & Steak House during any of the alleged events involving
either aggrieved person, and who generally does not exercise managerial
responsibility at Stars Cabaret & Steak House—will consider responding
further.'

"Analysis and Ruling:

"For the reasons stated above in the ruling on Request for Admission No.
2, the record does not establish that an answer regarding locations other than
Freehoo/Beaverton is 'reasonably likely to produce information that is generally
relevant to the case.' However, if Respondent Struhar was intoxicated or under
the influence of illegal drugs while acting in a managerial capacity in

1 Freehoo/Beaverton, that may be evidence of the workplace culture and
2 management oversight. Accordingly, he is directed to provide a response for any
such instances in the years 2012-2014.

3 *"Discovery Requested and Objection:*

4 'REQUEST NO. 28: Admit Respondent Todd Mitchell has acted in a
5 managerial capacity inside a Stars establishment while intoxicated or under
the influence of illegal drugs.

6 'RESPONSE: Respondents object to this request as not reasonably likely
7 to produce information that is generally relevant to the case. Respondents
8 further object to this request as seeking information outside of the Agency's
9 jurisdiction; the Oregon Liquor License Commission and criminal
10 prosecutors, not the Bureau of Labor and Industries, have jurisdiction over
such matters. If the Agency narrows this request so that it relates to the
claims and allegations regarding Aggrieved Person #1 or Aggrieved Person
#2, Respondent Mitchell—who was not alleged to have been present inside
Stars Cabaret & Steak House during any of the alleged

11 events involving either aggrieved person—will consider responding further.'

12 *"Analysis and Ruling:*

13 "See Analysis and Ruling as to Request for Admission No. 25, which is
14 incorporated herein in its entirety.

15 *"Discovery Requested and Objection:*

16 'REQUEST NO. 31: Admit Respondent Randy Kaiser has acted in a
17 managerial capacity inside a Stars establishment while intoxicated or under
the influence of illegal drugs.

18 'RESPONSE: Respondents object to this request as not reasonably likely
19 to produce information that is generally relevant to the case. Respondents
20 further object to this request as seeking information outside of the Agency's
21 jurisdiction; the Oregon Liquor License Commission and criminal
22 prosecutors, not the Bureau of Labor and Industries, have jurisdiction over
such matters. If the Agency narrows this request so that it relates to the
claims and allegations regarding Aggrieved Person #1 or Aggrieved Person
#2, Respondent Kaiser—who was not alleged to have been present inside
Stars Cabaret & Steak House during any of the alleged events involving
either aggrieved person—will consider responding further.'

1 *"Analysis and Ruling:*

2 *"See Analysis and Ruling as to Request for Admission No. 25, which is*
3 *incorporated herein in its entirety."*

4 **"I. REQUESTS FOR PRODUCTION**

5 *"Discovery Requested and Objection:*

6 'REQUEST FOR PRODUCTION NO. 9: All documents or electronic records
7 regarding the bylaws for Respondent Frehoo, Inc. and all akas.

8 'RESPONSE: Respondents object to this request as not reasonably likely
9 to produce information that is generally relevant to the case. Respondents
10 object this request to the extent that it seeks information about any entity
11 other than Frehoo, Inc. dba Stars Cabaret & Steak House, as Frehoo does
12 not do business under any name other than Stars Cabaret & Steak House,
13 and the other listed entities are separate companies that are not parties to
14 this case. Subject to and without waiving this objection, Respondents will
15 produce the bylaws of Frehoo, Inc.'

16 *"Analysis and Ruling:*

17 *"It appears that Respondents provided the bylaws for Freehoo/Beaverton*
18 *to the Agency on August 19, 2016. Accordingly, this request is moot.*

19 *"Discovery Requested and Objection:*

20 'REQUEST FOR PRODUCTION NO. 13: All documents or electronic
21 records prepared during the regular course of business as a result of the
22 settlement agreement entered into with the City of Beaverton, executed by
23 Jeff Struhar on April 30, 2015 and Dennis Doyle on May 5, 2015.

24 'RESPONSE: Respondents object to this request as overbroad, failing to
25 describe the information sought with sufficient specificity to allow for a
26 meaningful response, and not reasonably likely to produce information that
27 is generally relevant to the case. Respondents further object to this request
28 as seeking attorney-client privileged and/or, to the extent work-product
29 protections apply in this Forum, attorney work product information.
30 Respondents further object to this request as seeking evidence of conduct
31 or statements made in compromise negotiations. If Complainant can
32 narrow this request and explain its relevance and admissibility,
33 Respondents will consider responding further.'

1 *"Analysis and Ruling:*

2 "The Agency contends that '[w]hether or not Respondents have kept
3 records related to age verification and records related to their alleged "zero sex
4 trafficking" policy, as required by the Beaverton Settlement Agreement, is relevant
5 to the Agency's case.' Respondents argue, among other things, that this request
6 seeks records after the time period of the alleged events in the Formal Charges.
The agreement was executed on May 5, 2015 and as of July 30, 2016,
Freehoo/Beaverton is no longer in operation. Aggrieved Person #1 last danced at
Freehoo/Beaverton in 2012, and Aggrieved Person No. 2 last danced at
Freehoo/Beaverton on August 30, 2014.

7 "The Settlement Agreement makes reference to 'maintain[ing] its zero-
8 tolerance policy regarding sex trafficking and prostitution, as set forth in Exhibit A.'
9 Exhibit 4 to Respondents Response, p. 3. Exhibit A is a picture of a poster stating
10 that 'Stars Cabaret maintains a zero tolerance policy for prostitution and/or sex
11 trafficking.' *Id.* at 18. This information referenced in Section 4 of the Settlement
Agreement is 'reasonably likely to produce information that is generally relevant to'
the Agency requests for alternative relief on page 20 of the Formal Charges.
Accordingly, those records should be produced.

12 "The Agency has not sustained its burden to establish the relevance of the
13 other records sought with this request and, thus, the remainder of the request is
DENIED.

14 *"Discovery Requested and Objection:*

15 'REQUEST FOR PRODUCTION NO. 14: Any and all communications,
16 including but not limited to emails, text messages, correspondence, etc.,
between any of the named respondents regarding the facts alleged or the
aggrieved persons mentioned in the Formal Charges.

17 'RESPONSE: Respondents object to this request as seeking attorney-client
18 privileged and/or, to the extent work-product protections apply in this Forum,
attorney work product information. Respondents further object to this
19 request as overbroad, unduly burdensome, and as failing to describe the
information sought with sufficient specificity to allow for a meaningful
20 response. Subject to and without waiving these objections, Respondents
incorporate by reference the responses to Interrogatory No. 1 and
21 Interrogatory No. 2 directed at each of the Individual Respondents. If
Complainant can narrow this request, Respondents will consider
22 responding further.'

1 *"Analysis and Ruling:*

2 "It does not appear that Respondents addressed this request in their
3 response [to the Agency's motion].³⁹ Accordingly, Respondents must provide the
4 requested information, but may withhold documents which are covered by the
5 attorney-client or work product privileges.

6 *"Discovery Requested and Objection:*

7 'REQUEST FOR PRODUCTION NO. 15: Any and all communications,
8 including but not limited to emails, text messages, correspondence, etc.,
9 between any of the named respondents and other individuals, outside the
10 protection of attorney-client privilege, regarding the facts alleged or the
11 aggrieved persons mentioned in the Formal Charges.

12 'RESPONSE: Respondents incorporate by reference their response to
13 Request No. 14.'

14 *"Analysis and Ruling:*

15 "It does not appear that Respondents addressed this request in their
16 response [to the Agency's motion]. Accordingly, Respondents must provide the
17 requested information, but may withhold documents which are covered by the
18 attorney-client or work product privileges.

19 *"Discovery Requested and Objection:*

20 'REQUEST FOR PRODUCTION NO. 17: Any and all names or identities
21 used by all named respondents on social media, including but not limited to
22 Facebook, Twitter, Instagram, LinkedIn, Snap Chat, XOTICSPOT.

23 'RESPONSE: This request does not request any specific document or
24 group of documents, and Respondents therefore treat it as an interrogatory.
Respondents object to this request as overbroad and not reasonably likely
to produce information that is generally relevant to the case. Respondents
further object to this request as seeking attorney-client privileged and/or, to
the extent work-product protections apply in this Forum, attorney work
product information. Subject to and without waiving these objections,
Respondents state that Stars Cabaret & Steak House uses the following
social media accounts: Facebook—"Starsbeaverton"; Twitter—"stars
Beaverton.'"

³⁹ The 39-page response submitted by Respondents did not track the order of the requests in the Agency's motion, making it challenging and time consuming to attempt to locate Respondents' responses to particular requests in the voluminous document. If Respondents believe an argument regarding this request was overlooked, they may notify the ALJ, with a copy to the Agency, by email.

1 *"Analysis and Ruling:*

2 "Respondents assert that they have produced all social media posts as to
3 Freehoo/Beaverton and that postings made by other Stars-named business are
4 irrelevant. The Agency contends that it has reason to believe that Respondents
5 use other methods of social media to promote the "Stars" business, collectively.'
6 For the reasons stated above, Respondents are not required to respond as to
7 postings made by other Stars-named businesses. However, if any postings were
8 made which promoted the Stars-named businesses 'collectively' -- as opposed to
9 a posting advertising an individual location other than Freehoo/Beaverton -- then
10 that information must be produced.

11 *"Discovery Requested and Objection:*

12 'REQUEST FOR PRODUCTION NO. 18: Any and all social media posts,
13 including but not limited to Facebook, Twitter, Instagram, LinkedIn,
14 SnapChat, XOTICSPOT, by any named respondent regarding any of the
15 facts alleged or the aggrieved persons mentioned in the Formal Charges.

16 'RESPONSE: Respondents object to this request as overbroad and not
17 reasonably likely to produce information that is generally relevant to the
18 case. Subject to and without waiving these objections, Respondents will
19 produce social media posts from the accounts listed in Respondents'
20 response to Request No. 17 that refer to either aggrieved person—and
21 Respondents are not presently aware of any such posts—or to
22 Respondents' anti-sex-trafficking efforts.'

23 *"Analysis and Ruling:*

24 "It does not appear that Respondents objected to this request in its
25 response [to the Agency's motion]. However, it appears from the response above
26 that any material would already be produced in response to Request No. 17.
27 Accordingly, [no] further response is required.

28 *"Discovery Requested and Objection:*

29 'REQUEST FOR PRODUCTION NO. 19: Any and all social media posts,
30 including but not limited to Facebook, Twitter, Instagram, LinkedIn,
31 SnapChat, XOTICSPOT, by any named respondent regarding 'naughty
32 school girl' nights at Stars.

33 'RESPONSE: Respondents object to this request's use of the term "Stars"
34 because each Stars-branded club is owned and operated by separate
35 corporate entities, and none of the events regarding either aggrieved person
36 is alleged to have occurred at any club other than Stars Cabaret & Steak
37 House in Beaverton, Oregon. Respondents further object to this request as

1 overbroad and failing to describe the information sought with sufficient
2 specificity to allow for a meaningful response. Respondents further object
3 to this request as not reasonably likely to produce information that is
4 generally relevant to the case, insofar as there is no allegation that
5 Aggrieved Person #1 or #2 ever participated in any event at Stars Cabaret
6 & Steak House relating to the theme of "naughty school girl" nor do the
7 Formal Charges contend that either Aggrieved Person experienced
8 harassment as a result of Stars Cabaret & Steak House hosting such an
9 event. Respondents further object to this request as seeking information
10 regarding activities that Oregon's Supreme Court has declared to be
11 constitutionally-protected free expression. Respondents also object to this
12 request as overbroad insofar as it seeks age-based information, because
13 the Formal Charges allege only sex discrimination and include no claim for
14 age discrimination or any other claim for which age is a material element.
15 Without waiving and subject to these objections, Respondents state that
16 although this is a common "theme" night for gentlemen's clubs (and various
17 other non-adult clubs), Stars Cabaret & Steak House has not had any
18 schoolgirl-themed nights or events since at least 2010, and certainly did not
19 host any such events during or after the alleged events involving Aggrieved
20 Person No. 1 and Aggrieved Person No. 2 (i.e., between 2012 and the
21 present).

22 Respondents therefore have no relevant documents responsive to this
23 request.'

24
"Analysis and Ruling:

"Respondents assert that they have produced all social media posts as to
Freehoo/Beaverton and that postings made by other Stars-named business are
irrelevant. For the reasons stated above, Respondents are not required to respond
as to postings made by other Stars-named businesses. However, if any postings
were made which promoted the Stars-named businesses 'collectively' -- as
opposed to a posting advertising an individual location other than
Freehoo/Beaverton -- then that information must be produced.

"Discovery Requested and Objection:

'REQUEST FOR PRODUCTION NO. 20: All documents or electronic
records regarding advertising or promotion of 'naughty school girl' nights at
Stars.

'RESPONSE: Respondents object to this request's use of the term "Stars"
because each Stars-branded club is owned and operated by separate
corporate entities, and none of the events regarding either aggrieved person
is alleged to have occurred at any club other than Stars Cabaret & Steak
House in Beaverton, Oregon. Respondents further object to this request as

1 overbroad and failing to describe the information sought with sufficient
2 specificity to allow for a meaningful response. Respondents further object
3 to this request as not reasonably likely to produce information that is
4 generally relevant to the case, insofar as there is no allegation that
5 Aggrieved Person #1 or #2 ever participated in any event at Stars Cabaret
6 & Steak House relating to the theme of 'naughty school girl' nor do the
7 Formal Charges contend that either Aggrieved Person experienced
8 harassment as a result of Stars Cabaret & Steak House hosting such an
9 event. Respondents further object to this request as seeking information
10 regarding activities that Oregon's Supreme Court has declared to be
11 constitutionally-protected free expression. Respondents also object to this
12 request as overbroad insofar as it seeks age-based information, because
13 the Formal Charges allege only sex discrimination and include no claim for
14 age discrimination or any other claim for which age is a material element.
15 Without waiving and subject to these objections, Respondents state that
16 although this is a common "theme" night for gentlemen's clubs (and various
17 other non-adult clubs), Stars Cabaret & Steak House has not had any
18 schoolgirl-themed nights or events since at least 2010, and certainly did not
19 host any such events during or after the alleged events involving Aggrieved
20 Person No. 1 and Aggrieved Person No. 2 (i.e., between 2012 and the
21 present).

22 Respondents therefore have no relevant documents responsive to this
23 request.'

24 *"Analysis and Ruling:*

"Respondents assert that advertisements produced by other Stars-named
business[es] are irrelevant. For the reasons stated above, Respondents are not
required to respond with documents produced by other Stars-named businesses.
However, if there are any responsive documents which promoted the Stars-named
businesses 'collectively' -- as opposed to * * * an individual location other than
Freehoo/Beaverton -- then that information must be produced.

"Discovery Requested and Objection:

'REQUEST FOR PRODUCTION NO. 24: All documents and electronic
records, not previously provided to the Agency, sufficient to provide the
following information for all comments received via the Stars website at any
time during the past five years:

- 'a. All content submitted with each comment, including but not limited to
sender's name and email address;
- b. URL of the webpage used for submitting the comment;
- c. Email address(es) designated for receiving the comments;
- d. Identities of all Stars personnel able to access the comments;

1 e. Content of any response(s) to the comment.

2 'RESPONSE: Respondents object this request to the extent that it seeks
3 information about any entity other than Frehoo, Inc. dba Stars Cabaret &
4 Steak House, as Frehoo does not do business under any name other than
5 Stars Cabaret & Steak House, and the other listed entities are separate
6 companies that are not parties to this case. Respondents further object to
7 this request as overbroad, unduly burdensome, failing to describe the
8 information sought with sufficient specificity to allow for a meaningful
9 response, and not reasonably likely to produce information that is generally
relevant to the case. Subject to and without waiving these objections, will
produce any comments that satisfy all of the following criteria: comments
that (1) are from the website for Stars Cabaret & Steak House; (2) were
submitted during the time periods that the aggrieved persons allegedly were
present at Stars Cabaret & Steak House; and (3) reference sexual
harassment or either aggrieved person. At this time, Respondents are not
aware of any responsive documents.'

10 *"Analysis and Ruling:*

11 "It does not appear that Respondents objected to this request in its
12 response. The response above indicates that there are no responsive documents
13 for the time periods that the Aggrieved Persons were present or that reference
14 either Aggrieved Person. Respondents are also required to produce additional
responsive documents at Freehoo/Beaverton between the years 2012-2014, if
such documents exist.

15 *"Discovery Requested and Objection:*

16 'REQUEST FOR PRODUCTION NO. 28: Copies of any and all manager
logs from August 2012 through October 2014.

17 'RESPONSE: Respondents object to this request as overbroad and not
18 reasonably likely to produce information that is generally relevant to the
19 case to the extent it seeks documents covering dates on which neither
20 aggrieved person is alleged to have been present at Stars Cabaret & Steak
21 House. Subject to and without waiving these objections, Respondents state
that they already provided the Agency with this information when it was
requested from Respondents during the Agency's investigation, and that to
the best of Respondents' knowledge, no additional responsive documents
exist that are within their possession, custody, or control.'

22 *"Analysis and Ruling:*

23 "The Agency argues that Respondents should produce additional
24 responsive material dating back to 2010. However, the Agency only requested

1 information beginning with August 2012. Accordingly, Respondents' response
2 was sufficient.

3 *"Discovery Requested and Objection:*

4 'REQUEST FOR PRODUCTION NO. 32: All documents, logs, notes, or
5 electronic records of Respondents' compliance officer(s) for the past five
6 years.

7 'RESPONSE: Respondents object to this request as overbroad, vague in
8 that it fails to specify who the term "compliance officer" refers to, failing to
9 describe the information sought with sufficient specificity to allow for a
10 meaningful response, and not reasonably likely to produce information that
11 is generally relevant to the case. To the extent that this request refers to
12 documents relating to Frehoo's settlement with the City of Beaverton,
13 Respondents further object to this request as seeking evidence of conduct
14 or statements made in compromise negotiations. If Complainant can
15 narrow this request and explain its relevance and admissibility,
16 Respondents will consider responding further.'

17 *"Analysis and Ruling:*

18 "For the reasons stated above regarding Request for Production No. 13,
19 these records do not need to be produced.

20 *"Discovery Requested and Objection:*

21 'REQUEST NO. 37: All images, digital or otherwise, within the custody or
22 control of any named Respondent of the VIP area of the Beaverton Stars
23 between 2012 and the present

24 'RESPONSE: Respondents object to this request as vague, as there is no
area of Stars Cabaret & Steak House that is designated as a "VIP area."
Respondents further object to this request as overbroad and not reasonably
likely to produce information that is generally relevant to the case. If
Respondents can clarify this request and explain its relevance,
Respondents will consider responding further.'

"Analysis and Ruling:

"In its motion, the Agency clarified that it was seeking images of an area on
the floorplan of the Beaverton location with a raised floor called 'VIP Seating.'
Respondents contend that the request is overbroad because it would encompass
pictures of individuals dancing who are not parties to this case. A photograph of
this seating area is reasonably likely to produce information generally relevant to
the case as it will help the forum understand the environment in which the

1 Aggrieved Persons performed. However, Respondents raised valid concerns.
2 Accordingly, if Respondents have 'images, digital or otherwise' of the VIP Seating
3 area that do not contain images of dancing or patrons, then those must be
4 produced.

5 ***"Agency's 2nd Informal Request for Discovery***

6 ***"A. INTERROGATORIES***

7 ***"Discovery Requested and Objection:***

8 'Interrogatory No. 12: Aside from Aggrieved Person #1 and Aggrieved
9 Person #2, describe all instances in which a person under the age of 18
10 was present at Stars Cabaret-Bridgeport.

11 'Response No. 12: Frehoo objects to this interrogatory on multiple grounds.
12 First, insofar as this interrogatory seeks information regarding underage
13 individuals at properties or businesses other than the one (Stars Cabaret &
14 Steak House) in which the Agency claims Aggrieved Persons #1 or #2
15 allegedly worked, it is not reasonably likely to produce information that is
16 generally relevant to the case because: (1) Stars Cabaret-Bridgeport is
17 owned and operated by corporate entities that are not parties to this
18 proceeding; (2) none of the unlawful conduct alleged to have been
19 experienced by either Aggrieved Person occurred at Stars Cabaret-
20 Bridgeport; and (3) Respondents are unaware of any allegation that either
21 Aggrieved Person ever worked at Stars Cabaret-Bridgeport. Moreover,
22 because the Formal Charges allege only sex discrimination and include no
23 claim for age discrimination or any other claim for which age is a material
24 element, this interrogatory seeks information that is not reasonably likely to
produce information that is generally relevant to the case. Respondents will
consider responding further if the Agency will explain the relevance of the
request.'

17 ***"Analysis and Ruling:***

18 'For the reasons stated above in the ruling on Request for Admission No.
19 2, the record does not establish that an answer regarding locations other than
20 Freehoo/Beaverton is 'reasonably likely to produce information that is generally
21 relevant to the case.' Therefore, this request is DENIED.

22 ***"Discovery Requested and Objection:***

23 'Interrogatory No. 13: Aside from Aggrieved Person #1 and Aggrieved
24 Person #2, describe all instances in which a person under the age of 18
was present at Stars Cabaret...At the Capitol.

1 'Response No. 13: Frehoo objects to this interrogatory on multiple grounds.
2 First, insofar as this interrogatory seeks information regarding underage
3 individuals at properties or businesses other than the one (Stars Cabaret &
4 Steak House) in which the Agency claims Aggrieved Persons #1 or #2
5 allegedly worked, it is not reasonably likely to produce information that is
6 generally relevant to the case because: (1) Stars Cabaret...At the Capitol is
7 owned and operated by corporate entities that are not parties to this
8 proceeding; (2) none of the unlawful conduct alleged to have been
9 experienced by either Aggrieved Person occurred at Stars Cabaret...At the
Capitol; and (3) Respondents are unaware of any allegation that either
Aggrieved Person ever worked at Stars Cabaret...At the Capitol. Moreover,
because the Formal Charges allege only sex discrimination and include no
claim for age discrimination or any other claim for which age is a material
element, this interrogatory seeks information that is not reasonably likely to
produce information that is generally relevant to the case. Respondents will
consider responding further if the Agency will explain the relevance of the
request.'

10 *"Analysis and Ruling:*

11 "For the reasons stated above in the ruling on Request for Admission No.
12 2, the record does not establish that an answer regarding locations other than
13 Freehoo/Beaverton is 'reasonably likely to produce information that is generally
relevant to the case.' Therefore, this request is DENIED.

14 *"Discovery Requested and Objection:*

15 'Interrogatory No. 14: Aside from Aggrieved Person #1 and Aggrieved
16 Person #2, describe all instances in which a person under the age of 18
was present at Stars Cabaret...In the Cascades.

17 'Response No. 14: Frehoo objects to this interrogatory on multiple grounds.
18 First, insofar as this interrogatory seeks information regarding underage
19 individuals at properties or businesses other than the one (Stars Cabaret &
20 Steak House) in which the Agency claims Aggrieved Persons #1 or #2
21 allegedly worked, it is not reasonably likely to produce information that is
22 generally relevant to the case because: (1) Stars Cabaret...In the Cascades
23 is owned and operated by corporate entities that are not parties to this
24 proceeding; (2) none of the unlawful conduct alleged to have been
experienced by either Aggrieved Person occurred at Stars Cabaret...In the
Cascades; and (3) Respondents are unaware of any allegation that either
Aggrieved Person ever worked at Stars Cabaret...In the Cascades.
Moreover, because the Formal Charges allege only sex discrimination and
include no claim for age discrimination or any other claim for which age is a
material element, this interrogatory seeks information that is not reasonably
likely to produce information that is generally relevant to the case.

1 Respondents will consider responding further if the Agency will explain the
2 relevance of the request.'

3 *"Analysis and Ruling:*

4 "For the reasons stated above in the ruling on Request for Admission No.
5 2, the record does not establish that an answer regarding locations other than
6 Freehoo/Beaverton is 'reasonably likely to produce information that is generally
7 relevant to the case.' Therefore, this request is DENIED.

8 *"Discovery Requested and Objection:*

9 'Interrogatory No. 16: Describe any and all circumstances, including
10 promotional or event appearances, in which Stars Cabaret-Bridgeport
11 operates business activities outside of the Stars Cabaret-Bridgeport facility
12 in Bridgeport.

13 'Response No. 16: Frehoo objects to this request as not reasonably likely
14 to produce information that is generally relevant to the case because: (1)
15 Stars Cabaret-Bridgeport is owned and operated by corporate entities that
16 are not parties to this proceeding; (2) none of the unlawful conduct alleged
17 to have been experienced by either Aggrieved Person occurred at Stars
18 Cabaret-Bridgeport; (3) Respondents are unaware of any allegation that
19 either Aggrieved Person ever worked at Stars Cabaret-Bridgeport; and (4)
20 there is no allegation that Aggrieved Person #1 or #2 ever participated in
21 any promotional or event appearance outside of the Stars Cabaret-
22 Bridgeport facility in Bridgeport, nor do the Formal Charges contend that
23 either Aggrieved Person experienced harassment as a result of Stars
24 Cabaret-Bridgeport operating business activities outside of the Stars
Cabaret-Bridgeport facility in Bridgeport. Frehoo further objects to this
request as seeking information regarding activities that Oregon's Supreme
Court has declared to be constitutionally protected free expression.
Respondents will consider responding further if the Agency will explain the
relevance of the request.'

18 *"Analysis and Ruling:*

19 "For the reasons stated above in the ruling on Request for Admission No.
20 2, the record does not establish that an answer regarding locations other than
21 Freehoo/Beaverton is 'reasonably likely to produce information that is generally
22 relevant to the case.' Therefore, this request is DENIED.

23 *"Discovery Requested and Objection:*

24 'Interrogatory No. 17: Describe any and all circumstances, including
promotional or event appearances, in which Stars Cabaret.. in the Capitol

operates business activities outside of the Stars Cabaret...In the Capitol facility in Salem.

'Response No. 17: Frehoo objects to this request as not reasonably likely to produce information that is generally relevant to the case because: (1) Stars Cabaret...In the Capitol is owned and operated by corporate entities that are not parties to this proceeding; (2) none of the unlawful conduct alleged to have been experienced by either Aggrieved Person occurred at Stars Cabaret...In the Capitol; (3) Respondents are unaware of any allegation that either Aggrieved Person ever worked at Stars Cabaret...In the Capitol; and (4) there is no allegation that Aggrieved Person #1 or #2 ever participated in any promotional or event appearance outside of the Stars Cabaret...In the Capitol facility in Salem, nor do the Formal Charges contend that either Aggrieved Person experienced harassment as a result of Stars Cabaret...In the Capitol operating business activities outside of the Stars Cabaret...In the Capitol facility in Salem. Frehoo further objects to this request as seeking information regarding activities that Oregon's Supreme Court has declared to be constitutionally protected free expression. Respondents will consider responding further if the Agency will explain the relevance of the request.'

"Analysis and Ruling:

"For the reasons stated above in the ruling on Request for Admission No. 2, the record does not establish that an answer regarding locations other than Freehoo/Beaverton is 'reasonably likely to produce information that is generally relevant to the case.' Therefore, this request is DENIED.

"Discovery Requested and Objection:

'Interrogatory No. 18: Describe any and all circumstances, including promotional or event appearances, in which Stars Cabaret...In the Cascades operates business activities outside of the Stars Cabaret...In the Cascades facility in Bend.

'Response No. 18: Frehoo objects to this request as not reasonably likely to produce information that is generally relevant to the case because: (1) Stars Cabaret...In the Cascades is owned and operated by corporate entities that are not parties to this proceeding; (2) none of the unlawful conduct alleged to have been experienced by either Aggrieved Person occurred at Stars Cabaret...In the Cascades; (3) Respondents are unaware of any allegation that either Aggrieved Person ever worked at Stars Cabaret...In the Cascades; and (4) there is no allegation that Aggrieved Person #1 or #2 ever participated in any promotional or event appearance outside of the Stars Cabaret...In the Cascades facility in Bend, nor do the Formal Charges contend that either Aggrieved Person experienced

1 harassment as a result of Stars Cabaret...In the Cascades operating
2 business activities outside of the Stars Cabaret...In the Cascades facility in
3 Bend. Freehoo further objects to this request as seeking information
4 regarding activities that Oregon's Supreme Court has declared to be
constitutionally protected free expression. Respondents will consider
responding further if the Agency will explain the relevance of the request.'

5 *"Analysis and Ruling:*

6 "For the reasons stated above in the ruling on Request for Admission No.
7 2, the record does not establish that an answer regarding locations other than
Freehoo/Beaverton is 'reasonably likely to produce information that is generally
relevant to the case.' Therefore, this request is DENIED.

8 **"B. REQUESTS FOR PRODUCTION**

9 *"Discovery Requested and Objection:*

10 'REQUEST NO. 40: Copies of any and all advertising and/or promotional
11 material pertaining to 'naughty school girl' theme nights, events, or parties
at Stars Cabaret & Steak House, Stars Cabaret Bridgeport, Stars
Cabaret...At the Capitol, and Stars Cabaret...In the Cascades.

12 'RESPONSE: Respondents object to this request on multiple grounds.
13 First, insofar as this request seeks information regarding advertising and/or
14 promotional material pertaining to "naughty school girl" theme nights,
15 events, or parties at properties or businesses other than the one (Stars
Cabaret & Steak House) where the Agency claims Aggrieved Persons #1
16 or #2 worked, it is not reasonably likely to produce information that is
generally relevant to the case because: (1) Stars-Bridgeport, Stars
Cabaret...At the Capitol, and Stars Cabaret...In the Cascades are owned
17 and operated by corporate entities that are not parties to this proceeding;
(2) none of the unlawful conduct alleged to have been experienced by either
18 Aggrieved Person #1 or #2 occurred at Stars-Bridgeport, Stars Cabaret...At
the Capitol, or Stars Cabaret...In the Cascades; and (3) Respondents are
19 unaware of any allegation that either Aggrieved Person #1 or #2 ever
worked at Stars-Bridgeport, Stars Cabaret...At the Capitol, or Stars
Cabaret...In the Cascades. Respondents further object to this request as
20 not reasonably likely to produce information that is generally relevant to the
case, insofar as there is no allegation that Aggrieved Person #1 or #2 ever
21 participated in any event at Stars Cabaret & Steak House relating to the
theme of "naughty school girl," nor do the Formal Charges contend that
22 either Aggrieved Person experienced harassment as a result of Stars
Cabaret & Steak House hosting such an event. Respondents further object
23 to this request as seeking information regarding activities that Oregon's
Supreme Court has declared to be constitutionally-protected free
24 expression. Respondents also object to this request as overbroad insofar

1 as it seeks age-based information, because the Formal Charges allege only
2 sex discrimination and include no claim for age discrimination or any other
3 claim for which age is a material element. Finally, Respondents object to
4 this request as overbroad insofar as it seeks information regarding
5 advertising and/or promotional material pertaining to "naughty school girl"
6 theme nights, events, or parties outside of times material to this matter.
7 Without waiving and subject to said objections, Respondents state that
8 there are no documents to produce in response to this request, as Stars
9 Cabaret & Steak House did not host any "naughty school girl" theme nights,
10 events, or parties at any time between January 1, 2012 and September 31,
11 2014, which (viewed expansively), is the relevant time period relating to this
12 action.'

13
14 *"Analysis and Ruling:*

15 "For the reasons stated above in the ruling on Request for Admission No.
16 2, the record does not establish that an answer regarding locations other than
17 Freehoo/Beaverton is 'reasonably likely to produce information that is generally
18 relevant to the case.' Therefore, this request is DENIED.

19 ***"Information obtained via Subpoenas issued by Respondents***

20 "The Agency requests that Respondents produce information relevant to
21 this case pursuant to subpoenas issued with response times beyond the informal
22 discovery and discovery motion deadlines. The Agency further asks that if
23 Respondents contend documents received in response to subpoenas are not
24 relevant, that those documents be submitted to the ALJ for an *in camera* review
and relevancy determination. It does not appear that Respondents objected to this
motion. Accordingly, the Agency's request is granted.

25 **"SUMMARY OF RULINGS REQUIRING ACTION FROM RESPONDENTS**

26 "Respondents are directed to do the following by September 12, 2016:⁴⁰

27 *"Interrogatories*

- 28 • Freehoo/Beaverton is directed to answer Interrogatory No. 3 in the Agency's
29 First Informal Request for Discovery, but may limit its response to
30 Freehoo/Beaverton.
- 31 • Respondents Colburn, Heinzman-Myers, Herkenrath, Kaiser and Mitchell

32 ⁴⁰ The parties may agree to modify this date. If there is a mutual agreement, the parties may simply email
33 the ALJ with the agreed date for production and the ALJ will issue an interim order approving that date. If
34 there is a disagreement as to the production date, the parties can request a prehearing telephone
conference to address that.

1 are directed to answer Interrogatory No. 6 of the Agency's First Informal
2 Request for Discovery, but may limit the answer to whether he/she had a
3 romantic or sexual relationship with an employee or independent contractor
4 at Freehoo/Beaverton in the years 2012-2014.

5
6 *"Requests for Admission"*

- 7
- 8 • Respondents are directed to respond to Requests for Admission 25, 28 and
9 31 to admit or deny whether there were any such instances while acting in
10 a managerial capacity in Freehoo/Beaverton in the years 2012-2014.

11 *"Requests for Production"*

- 12
- 13 • Provide copies of the information referenced in Section 4 of the Settlement
14 Agreement with the City of Beaverton to the Agency. Since those
15 documents may include names of individuals who are not parties to these
16 proceedings, the documents may be produced subject to the terms of the
17 interim protective order in this case.
 - 18 • Respondents must provide the information requested in Request for
19 Production No14 and 15, but may withhold documents that are covered by
20 the attorney-client or work product privileges.
 - 21 • In response to Request for Production Nos. 17, 19 and 20, if any documents
22 or postings were made which promoted the Stars-named businesses
23 'collectively' -- as opposed to a posting advertising an individual location
24 other than Freehoo/Beaverton -- then Respondents must produce that
information.
 - In response to Request for Production No. 24, Respondents must produce
additional responsive documents for Freehoo/Beaverton between the years
2012-2014, if such documents exist.
 - If Respondents have 'images, digital or otherwise' of the VIP Seating area
in Freehoo/Beaverton that do not contain images of dancing or patrons,
then those must be produced to the Agency.
 - Respondents must provide copies of documents received in response to
subpoenas that were issued to the Agency. If subpoena responses are
received after the date of this interim order, Respondents must provide
copies of the responses to the Agency within seven days after receiving the
subpoena responses. If Respondents contend documents received in
response to subpoenas are not relevant, those documents should be
submitted to the ALJ for an *in camera* review and relevancy determination."

(Exs. X64, X75, X83)

31) Respondents filed a Motion to Compel discovery on August 15, 2016. The Agency responded to the motion on August 22, 2016. On September 7, 2016, an interim order was issued ruling on the motion which stated, in pertinent part:

"LEGAL STANDARD

'Any discovery request must be reasonably likely to produce information that is generally relevant to the case.' OAR 839-050-0200(7). * * *

* * * * *

"ANALYSIS OF RESPONDENTS' MOTION

* * * * *

"Discovery Related to Aggrieved Person # 2

"A. Interrogatories the Agency Did Not Respond to Individually

"Discovery Requested and Objection:

"Respondents assert that the Agency asserted a 'global objection as to form' to the following interrogatories:

'INTERROGATORY NO. 94: Describe all specific employment actions or decisions by any of the Individual Respondents or any other Stars Cabaret and Steak House owner, officer, manager, employee, or agent that the Agency contends constituted or contributed to an unlawful employment practice with regard to Aggrieved Person #2.'

'INTERROGATORY NO. 95: With respect to Complainant's response to Interrogatory No. 62, identify any individual manager of Frehoo, who told her she was required "to dance nude for customers" and Aggrieved Person #2's response, including whether she stated that she did not wish to dance or wished to leave and to whom Aggrieved Person #2 communicated this information.'

'INTERROGATORY NO. 102: With respect to Complainant's denial of Requested Admission No. 27 ("that Aggrieved Person #2 was located by authorities as a result of notification by Stars to criminal authorities"), describe the factual basis of this denial.'

"INTERROGATORY NO. 103: With respect to Complainant's denial of Requested Admission No. 28 ("that Jon Herkenrath testified in a grand jury proceeding whereby Washington County District Attorney sought to charge Anthony Curry with criminal misconduct'), describe the factual basis of this denial."

1 'INTERROGATORY NO. 105: With respect to Complainant's denial of
2 Requested Admission No. 30 ("that Anthony Curry does not have a personal
3 relationship with any manager, employee, or owner of Stars"), describe the
4 factual basis of this denial, including any relationship that the Agency
5 contends existed between Curry and any owner, officer, manager,
6 employee, or agent of Stars Cabaret & Steak House.'

7 'INTERROGATORY NO. 106: With respect to Complainant's denial of
8 Requested Admission No. 37 ("that while Aggrieved Person #2 worked at
9 Stars, she received the shifts she requested"), describe the factual basis of
10 this denial.'

11 "The Agency objected to all of these requests, asserting that they had
12 multiple discreet subparts and did not comply with OAR 839-050-0200(6).

13 *"Analysis and Ruling:*

14 "For the same reasons set forth above regarding Interrogatory Nos. 77, 78,
15 79, 82, 84, 85, 86, 87, 89, 90 and 91, the Agency is also directed to answer
16 Interrogatory Nos. 94, 95, 102, 103, 105 and 106.

17 **"B. Alleged Improper Objections or Improper Answers to Interrogatories**

18 *"Discovery Requested and Objection:*

19 'INTERROGATORY NO. 59: Identify and describe any and all other adult
20 entertainment, gentlemen's club, or similar establishment where Aggrieved
21 Person #2 worked as a dancer, whether before or after she worked at Stars'
22 Beaverton location, and identify further whether she presented the same
23 identification at any other club where she worked.'

24 'RESPONSE: Agency objects as this interrogatory is overbroad and
irrelevant to the charges against Respondents.'

'INTERROGATORY NO. 60: If Aggrieved Person #2 did not work at any
other club, specify whether she previously gained entry to any other similar
establishment. If so, did she present the same identification she used at
Stars?'

'RESPONSE: Agency objects as this interrogatory is overbroad and
irrelevant to the charges against Respondents.'

"Analysis and Ruling:

"At the present time it is unclear whether these interrogatories are
'reasonably likely to produce information that is generally relevant to' whether there

1 was negligence in verifying forms of identification. However, these interrogatories
2 are likely to produce information generally relevant to emotional distress damages.
Accordingly, the Agency must answer Interrogatories 59 and 60.

3 *"Discovery Requested and Objection:*

4 'INTERROGATORY NO. 61: Identify and describe any communications
5 between any employee or manager of Stars and Anthony Curry, including
6 whether Aggrieved Person #2 participated in that communication, the
circumstances, any witnesses or other participants in such
communications, and the purpose of the communication.'

7 'RESPONSE: The Agency objects to this interrogatory as the information
8 is outside of the Agency's possession or control. The Agency does know
9 that Aggrieved Person #2 spoke with Respondent Herkenrath verbally on
the phone regarding scheduling for work. Aggrieved Person #2 stated these
contacts occurred on a cell phone provided to her by Anthony Curry.'

10 *"Analysis and Ruling:*

11 "In the Agency's response to the motion to compel, it supplemented its
12 answer to this interrogatory to provide further detail, but the Agency should include
that additional detail in an amended interrogatory signed under oath in accordance
13 with OAR 839-050-0200.

14 *"Discovery Requested and Objection:*

15 'INTERROGATORY NO. 64: Attached as Exhibit A is a list of "Rules of
16 Conduct," "Entertainer Lessee Operating Guidelines," and related
documents. Identify the person who asked Aggrieved Person #2 to sign
17 these documents and describe whether, during the days that Aggrieved
Person #2 worked at Stars, she ever violated any of these Rules of Conduct
or Operating Guidelines. If so, describe in detail the facts and
18 circumstances surrounding any violation, including Aggrieved Person #2's
motivation for engaging in the violation, and any witnesses to any violation.'

19 'RESPONSE: Aggrieved Person #2 indicated that the documents looked
20 familiar to her but she wasn't sure if they were the exact same documents.
She stated she was given them on the day she auditioned, by the
21 unidentified manager, and was asked to fill them out. She stated
Respondents did not provide her a copy. Aggrieved Person #2 stated most
22 of the rules were not followed and she saw dancers violating them all the
time, with no action by management or other employees.'

1 *"Analysis and Ruling:*

2 "In its response, the Agency points out that its response to a subsequent
3 interrogatory provided more detail. Given the additional detail provided later, no
4 further response is needed.

5 *"Discovery Requested and Objection:*

6 'INTERROGATORY NO. 65: During the days Aggrieved Person #2 worked
7 at Stars, describe whether she did or said anything inconsistent with the age
8 as represented on the identification she used to gain entry to Stars,
9 including all details about such comments, statements, or actions, including
10 the circumstances, any witnesses to such comments or actions, and her
11 purpose in engaging in such conduct.'

12 ORIGINAL RESPONSE: 'The Agency objects to this interrogatory as
13 overbroad and vague. The Agency also objects as to standing.'

14 SUPPLEMENTAL RESPONSE: 'The Agency objects to this interrogatory
15 as overbroad and vague. The Agency further asserts that this interrogatory
16 is very poorly written and is a compound question containing multiple
17 subparts Respondents make no attempt to define what actions or conduct
18 would be "inconsistent with the age as represented on the identification
19 [Aggrieved Person #2] used" and the Agency refuses to speculate as to
20 Respondents' meaning.'

21 *"Analysis and Ruling:*

22 "Respondents are correct that this interrogatory may be relevant to whether
23 Respondents 'knew of should have known' Aggrieved Person #2 was underage.
24 However, as worded, it is overbroad and vague. Accordingly, the Agency should
25 amend its response to indicate what actions, if any, Aggrieved Person #2 did to
26 conceal the fact that she was underage, but need not respond further.

27 *"Discovery Requested and Objection:*

28 'INTERROGATORY NO. 66: During the days Aggrieved Person #2
29 allegedly worked at Stars, does the Agency have evidence that anyone had
30 sex or engaged in sexual acts on the Stars premises? If so, describe the
31 circumstances, the identity of the persons involved, any other witnesses,
32 and the location.'

33 'RESPONSE: According to witnesses, it was not uncommon for dancers to
34 engage in sexual acts on Respondents' premises. During the course of the
35 Agency's investigation dancers, customers, and Respondents' club
36 manager acknowledged that this was a systemic problem at Respondents'

1 establishments. Respondents have not produced any evidence to prove
2 that they addressed or corrected the systemic problems of sexual acts on
3 the club's premises. Aggrieved Person #2 suffered from sexual abuse and
4 harassment as a result of Respondents' acts or omissions. These
5 witnesses are named in the previously provided discovery and include but
6 are not limited to Nathan Wheeler, Steve Toth, the Aggrieved Persons, and
7 unidentified customers. The Agency relies upon the discovery previously
8 provided, including but not limited to Bates No. 00034, 000035, and 001134-
9 001265.'

6 *"Analysis and Ruling:*

7 "The Agency should amend its response to indicate whether any sexual acts
8 occurred on the premises of Freehoo/Stars during the days Aggrieved Person #2
9 allegedly worked at Freehoo/Stars.

9 *"Discovery Requested and Objection:*

10 'INTERROGATORY NO. 127: Identify and describe with specificity,
11 including but not limited to the particular Bates numbers of documents, all
12 evidence or information in the Agency's possession or knowledge that the
13 Agency contends supports the Agency's denial that "Aggrieved Person #2
14 did not engage in prostitution at Stars Cabaret & Steak House," as stated
15 in Request for Admission No. 81.'

16 'RESPONSE: The Agency objects to this Interrogatory on the basis that it
17 is vague and Respondents failed to define what they meant by "prostitution."
18 Notwithstanding that objection, to the extent that "prostitution" may include
19 "sexually explicit conduct" within ORS 163.665(3), the Agency asserts that
20 Aggrieved Person #2 was engaged in unlawful sexually explicit conduct
21 during the entire course of her employment at Stars Cabaret and Steak
22 House.'

17 *"Analysis and Ruling:*

18 "In the Agency's response to the motion to compel, it supplemented its
19 answer to this interrogatory to provide further detail, but the Agency should include
20 that additional detail in an amended interrogatory signed under oath in accordance
21 with OAR 839-050-0200.

21 *"Discovery Requested and Objection:*

22 'INTERROGATORY NO. 128: Identify and describe with specificity,
23 including but not limited to the particular Bates numbers of documents, all
24 evidence or information in the Agency's possession or knowledge that
demonstrates or tends to show that, at the time that Aggrieved Person #2

1 sought work at Stars, any of the Individual Respondents had any personal
2 knowledge of any shortcomings that existed in the age verification process.'

3 'RESPONSE: Respondents knew or should have known of any
4 shortcomings that existed in the age verification process based on their lack
5 of records and their inadequate vetting process. Evidence supporting this
6 response includes, but is not limited to, Bates Nos. 000028-000029,
7 000034, and 005407-016998.'

8 *"Analysis and Ruling:*

9 "In the Agency's response to the motion to compel, it supplemented its
10 answer to this interrogatory to provide further detail, but the Agency should include
11 that additional detail in an amended interrogatory signed under oath in accordance
12 with OAR 839-050-0200. Additionally, the response should indicate which clubs it
13 contends Respondents Kaiser, Mitchell and Struhar had 'particular control over.'

14 *"Discovery Requested and Objection:*

15 'INTERROGATORY NO. 129: Identify and describe with specificity,
16 including but not limited to the particular Bates numbers of documents, all
17 evidence or information in the Agency's possession or knowledge that
18 demonstrates or tends to show that any person who the Agency contends
19 was an owner, manager, representative, or agent of Stars Cabaret & Steak
20 House was aware at the time Freehoo retained Aggrieved Person #2 to work
21 as an exotic dancer that she had been "groomed by a sex offender" to seek
22 employment as a nude dancer.'

23 'RESPONSE: The Agency objects to this interrogatory on the basis of
24 relevance. Whether Respondents knew Aggrieved Person #2 had been
groomed by a sex offender to dance nude on stage is irrelevant to
Respondents' liability for their unlawful conduct.'

"Analysis and Ruling:

"Respondents note that the Agency denied Request for Admission No. 85
(that BOLI has no evidence to suggest that Freehoo was aware at the time it
retained Aggrieve Person #2 to work as an exotic danger that she had been
'groomed by a sex offender' to seek employment as a nude dancer'). Since this
request was denied, one must assume that some evidence on that point exists.
Such information is relevant to whether Respondents 'knew or should have known'
of the age of Aggrieved Person #2, and her willingness to work as a nude dancer,
which would assist the forum in understanding how reasonable person in
complainant's circumstances would have perceived the workplace conduct.
Accordingly, the Agency must respond.

1 *"Discovery Requested and Objection:*

2 'INTERROGATORY NO. 138: Identify all assumed (or "stage") names that
3 Aggrieved Person #2 used at any time in connection with working or
dancing at adult entertainment clubs from 2013 to the present.'

4 'RESPONSE: The Agency objects to this interrogatory to the extent that it
5 requests stage names used by Aggrieved Person #2 outside of her
6 employment with Respondents. Without waiving that objection, the Agency
offers the following response: Isis and [redacted].'

7 *"Analysis and Ruling:*

8 "This interrogatory is likely to produce information generally relevant to
emotional distress damages. Accordingly, the Agency must answer it.

9 *"Discovery Requested and Objection:*

10 'INTERROGATORY NO. 44: Copies of all photo identifications, whether
11 legitimate, counterfeit, or falsified, possessed and/or used by Aggrieved
Person #2 from 2014 to the present.'

12 'RESPONSE: The Agency objects to this request to the extent that it
13 requests identifications outside of times material to Aggrieved Person #2's
14 employment with Respondents. Without waiving its objection, the Agency
has previously provided Bates Nos. 001029, 001051-001053, and 001709."

15 *"Analysis and Ruling:*

16 "This interrogatory is likely to produce information generally relevant to
17 damages, and possibly other matters at issue. Accordingly, the Agency must
answer it.

18 **"Discovery Related to Both Aggrieved Persons**

19 **"A. Interrogatories the Agency Did Not Respond to Individually**

20 *"Discovery Requested and Objection:*

21 'INTERROGATORY NO. 107: Identify the specific act(s) or omission(s) by
22 each Respondent that you claim constitutes any part of the "systemic
practice of sexual harassment" that the Agency referred to in its responses
to Interrogatory No. 35 and Interrogatory No. 41.'

23 "The Agency objected, asserting that this interrogatory has multiple discreet
24 subparts and did not comply with OAR 839-050-0200(6).

1 *"Analysis and Ruling:*

2 "For the same reasons set forth above regarding Interrogatory Nos. 77, 78,
3 79, 82, 84, 85, 86, 87, 89, 90 and 91, the Agency is also directed to answer
4 Interrogatory 107.

5 *"Discovery Requested and Objection:*

6 'INTERROGATORY NO. 122: Identify and describe with specificity,
7 including but not limited to the particular Bates numbers of documents, all
8 evidence or information in the Agency's possession or knowledge that
9 demonstrates or tends to show that any of the Respondents authorized or
10 knowingly allowed prostitution to occur at Stars Cabaret & Steak House.
11 (Ex. G at 5).'

12 'RESPONSE: The Agency objects to this request as unduly repetitive and
13 previously asked and answered. The Agency incorporates its previous
14 responses to the above interrogatories here by reference. The Agency
15 notes that the mental element to the unlawful conduct in this case is known
16 or should have known.'

17 *"Analysis and Ruling:*

18 "The Agency provided information showing a number of interrogatories
19 already answered on these topics. Accordingly, the objection that this is unduly
20 repetitive is sustained, and no further answer is required.

21 *"Discovery Requested and Objection:*

22 'INTERROGATORY NO. 135: Describe all verbal communications
23 between either of the Aggrieved Persons and any employee of the Agency-
24 including the Commissioner-between 2012 and the present regarding or
25 referring to the possibility that the Aggrieved Persons would file any civil or
26 administrative action. The description should include the date, persons
27 present, and the substance of the conversation. (Ex. I at 3).'

28 'RESPONSE: The Agency objects to this interrogatory as to form because
29 it contains multiple subparts.

30 (a) Aggrieved Person #1: The Agency objects to this request as it is
31 overbroad, vague and requests information not generally relevant to
32 the factual matters alleged in this case. The Agency objects to this
33 request to the extent it requests information subject to work-product
34 and/or attorney-client information.

1 (b) Aggrieved Person #2: The Agency objects to this request as it is
2 overbroad, vague and requests information not generally relevant to
3 the factual matters alleged in this case. The Agency objects to this
request to the extent it requests information subject to work-product
and/or attorney-client information.'

4 and

5 'INTERROGATORY NO. 139: Describe all verbal communications
6 between either of the Aggrieved Persons and any employee of the
Agency—including the Commissioner—between 2012 and the present
7 regarding any of Respondents, exotic dancing, or any other matters
potentially relevant to their alleged claims. The description should include
8 the date, persons present, and the substance of the conversation.'

9 'RESPONSE: The Agency objects to this interrogatory as to form because
it contains multiple subparts. The Agency objects to these requests as they
10 are overbroad and vague. The Agency objects to these requests to the
extent they request information subject to work-product and/or attorney-
11 client information. Without waiving and subject to these objections, the
Agency offers the following responses:

12 (a) Pertaining to Aggrieved Person #1, the Agency has already
provided its investigative interview, Bates No. 001021-001025. This
13 interview took place on August 18, 2015. Present were BOLI
employees Rafael Colin and Chris Lynch.

14 (b) Pertaining to Aggrieved Person #2, the Agency has provided
15 Bates No. 001026-001028. This investigative interview was
conducted by Agency employee Maria Perez and took place on May
16 5, 2015, by phone. The Agency has additionally provided Bates No.
001032-001041, a summary of an interview of Aggrieved Person #2
17 that took place on December 12, 2015. Present were Agency
employees Chris Lynch and Jessica Ponaman.'

18 "Analysis and Ruling:

19 "The interrogatories are extremely broadly worded and are not focused on
20 information that is 'reasonably likely to produce information that is generally
relevant to the case.' The Agency's objection that these requests are overbroad
21 is sustained and no further response to these interrogatories is required.

1 **Requests for Production**

2 *"Discovery Requested and Objection:*

3 "The Agency objected to several requests on the grounds that 'the work
4 product of the Agency's administrative prosecutors is irrelevant to the facts at issue
 in the contested cases.' The requests and objections made were as follows:

5 'Request for Production No. 3: Communications relating to the Aggrieved
6 Persons' initial interviews with BOLI.'

7 'RESPONSE: All documents, not subject to privilege or work product
8 protection, regarding communications relating to the Aggrieved Persons'
 initial interviews with BOLI have been provided in discovery.'

9 'Request for Production No. 10: All documents and electronically stored
10 information that refer to, relate to or comprise any and all statements from
 any person or persons having any information or knowledge relating in any
 way to the allegations in the Complaint.'

11 'RESPONSE: Any information responsive to this request, and not subject
12 to privilege or work product protection, has been provided in the Agency's
 discovery that was previously provided to Respondents. Any subsequently
 acquired discovery will be provided as soon as possible.'

13 'Request for Production No. 11: All statements obtained by or on behalf of
14 the Agency from others, or made by the Aggrieved Persons or employees
 or officers of the Agency, concerning this action or its subject matter.'

15 'RESPONSE: Any information responsive to this request, and not subject
16 to privilege or work product protection, has been provided in the Agency's
 discovery that was previously provided to Respondents. Any subsequently
17 acquired discovery will be provided as soon as possible.'

18 'Request for Production No. 12: All videotapes, audiotapes, photographs or
19 other recordings and electronically stored information that relate in any way
 to the claims or to any work allegedly performed by the Aggrieved Persons
 at Stars.'

20 'RESPONSE: Any information responsive to this request, and not subject
21 to privilege or work product protection, has been provided in the Agency's
 discovery that was previously provided to Respondents. Any subsequently
22 acquired discovery will be provided as soon as possible. The Agency does
 not have access to information within Respondents' control that it has, thus
23 far, refused to provide.'

1 'Request for Production No. 25: Documentation of any and all
2 communications relating to any false identification either of the Aggrieved
Persons used to gain entry to or secure work at Stars.'

3 'RESPONSE: The Agency has provided all materials responsive to this
4 request, and not subject to privilege or work product protection, as part of
the discovery previously provided to Respondents.'

5 'Request for Production No. 37: All documents relating to, describing,
6 evidencing, or constituting communications between any employee,
representative, official, or agent of the Oregon Bureau of Labor & Industries
7 (BOLI) and the Oregon Department of Human Services (DHS) regarding or
relating to any of the Respondents, Steven Toth, Aggrieved Person #1, or
8 Aggrieved Person #2.'

9 'RESPONSE: The Agency objects to this request to the extent that it
10 requests information that would be protected work product. Without waiving
its objection, the Agency has previously provided this information, including
11 but not limited to Bates Nos. 001712, 001742-001749, and 001752-
001756.'

12 "Respondents also sought to compel documents responsive to the following
13 additional requests in this section of their argument, but the Agency did not
specifically respond or insert a copy of their objections into their response:

14 'Request for Production No. 38: All documents relating to, describing,
evidencing, or constituting communications between any employee,
15 representative, official, or agent of BOLI and the Washington County District
Attorney 's Office regarding or relating to any of respondents, Steven Toth,
16 Aggrieved Person #1, or Aggrieved Person #2. (Id. at 8).

17 'Request for Production No. 39: All documents relating to, describing,
evidencing, or constituting communications between any employee,
18 representative, official, or agent of BOLI and the Oregon Liquor Control
Commission (OLCC) regarding or relating to any of respondents, Steven
19 Toth, Aggrieved Person # 1 or Aggrieved Person #2. (Id.)

20 'Request for Production No. 40: All documents relating to, describing,
evidencing, or constituting communications between any employee,
21 representative, official, or agent of BOLI and the Beaverton Police
Department regarding or relating to any of respondents, Steven Toth,
22 Aggrieved Person #1, or Aggrieved Person #2. (Id.)'
23
24

1 *"Analysis and Ruling:*

2 "Although the Agency did not initially object to all of these requests on the
3 basis of relevancy, the ALJ is nevertheless required to make a determination as to
4 whether the request is 'reasonably likely to produce information that is generally
5 relevant to the case.' OAR 839-050-0200(7); see also OAR 839-050-0200(1)
6 (describing the role of the ALJ in authorizing discovery). As with many of
7 Respondents' interrogatories, these requests for production are extremely broadly
worded and are not focused on information that is 'reasonably likely to produce
information that is generally relevant to the case.' Additionally, the Agency
indicates that some information has already been produced in response to some
of the requests. Accordingly, no further response to these requests for production
is required.

8 *"Discovery Requested and Objection:*

9 'Request for Production No. 4: Any testimony the Aggrieved Persons
10 provided in any other proceeding, criminal or civil.'

11 'RESPONSE: The Agency objects to this request for production as
12 overbroad and on the basis of relevance. The Agency has provided all
testimony of the Aggrieved Persons in any relevant proceedings that are
within the Agency's possession or control.'

13 *"Analysis and Ruling:*

14 "This request is overbroad, to the extent it requests information that is not
15 related to the allegations in the Formal Charges. Since the Agency indicates it has
16 produced all documents 'it could reasonably obtain and that bore some relevance
to this proceeding,' no further response is required.

17 *"Discovery Requested and Objection:*

18 'Request for Production No. 15: All documents and electronically stored
19 information that concern, refer or relate to any charge or complaint against
20 Stars that the Aggrieved Persons filed or contemplated filing with any
21 governmental or administrative agency including, without limitation, the U.S.
22 Department of Labor ("DOL"), the Equal Employment Opportunity
Commission ("EEOC"), the National Labor Relations Board ("NLRB"), the
Oregon Department of Consumer and Business Services, Occupational
Health and Safety Division ("OR-OSHA"), and the Occupational Safety and
Health Administration ("OSHA").'

23 'RESPONSE: The Agency objects to this request as overbroad and
24 irrelevant. The Agency also objects on the basis of privileged
communications and protected work product.'

1 and

2 'Request for Production No. 22: All documents and electronically stored
3 information that evidence, memorialize, refer to, relate to or concern
4 possible legal action by the Aggrieved Persons against Stars that created
prior to the point when: (a) the Agency began informally or formally
investigating this matter; and/or (b) the Aggrieved Persons retained counsel
or sought legal advice.'

5 RESPONSE: 'The Agency objects to this request as overbroad, irrelevant,
6 and seeking protected and privileged information.'

7 *"Analysis and Ruling:*

8 "These requests for production are extremely broadly worded and are not
9 focused on information that is 'reasonably likely to produce information that is
generally relevant to the case.' No further response to these requests for
production is required.

10 *"Discovery Requested and Objection:*

11 'Request for Production No. 16: All documents and electronically stored
12 information relating to any legal proceeding or threatened legal proceeding
13 to which the Aggrieved Persons have been a party including, without
limitation, all documents relating to any lawsuits the Aggrieved Persons
have filed or threatened to file.'

14 RESPONSE: 'The Agency objects to this request as overbroad and
15 irrelevant. The Agency also objects on the basis of privileged
communications and protected work product.'

16 *"Analysis and Ruling:*

17 "This request is overbroad, to the extent it requests information that is not
18 related to the allegations in the Formal Charges. Since the Agency indicates it has
19 produced all documents 'it could reasonably obtain and that bore some relevance
to this proceeding,' no further response is required.

20 *"Discovery Requested and Objection:*

21 'Request for Production No. 19: All social media postings, communications,
22 blog entries, comments or other written material concerning or referring to
Stars that the Aggrieved Persons posted, uploaded or otherwise published
23 or communicated on any Internet-based communication of any kind
including, but not limited to, Facebook, Instagram, Snapchat, or other
platforms.'

1 RESPONSE: 'The Agency does not have anything responsive to this
2 request within its possession. Any further information will be provided as
3 soon as possible, once it's received.'

3 *"Analysis and Ruling:*

4 "The Agency's response is insufficient in that it does not indicate whether
5 the Aggrieved Persons attempted to locate responsive information on their social
6 media accounts. The Agency is directed to respond to this request by obtaining
7 responsive information from the Aggrieved Persons, regardless of whether
8 responsive information is currently 'within [the Agency's] possession.' See *In the
9 Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa*, 34 BOLI 102, 144
10 (2015), *appeal pending* (a respondent may request a discovery order to obtain
11 documents from a complainant through the Agency that are discoverable under
12 OAR 839-050-0020(7)).

9 *"Discovery Requested and Objection:*

10 'Request for Production No. 20 [amended]: All social media postings,
11 communications, blog entries, comments or other written material
12 concerning or referring to any activities by the Aggrieved Persons that either
13 of the Aggrieved Persons posted, uploaded or otherwise published or
14 communicated on any Internet-based communication of any kind including,
15 but not limited to, Facebook, Instagram, Snapchat or other platforms.

16 'Respondents will agree to narrow the relevant time period of this request
17 to 2012 to the present.'

18 'RESPONSE: The Agency objects to this request as overbroad and
19 irrelevant to the extent that it requests "all social media postings,
20 communications, blog entries, comments or other written material
21 concerning or referring to any activities by the Aggrieved Persons posted,
22 uploaded or otherwise published or communicated on any Internet-based
23 communication of any kind." If Respondents can narrow this request to
24 information relevant to this case, the Agency may consider responding
25 further.'

20 *"Analysis and Ruling:*

21 "Respondents assert that this request is relevant to determining 'possible
22 other causes of emotional distress.' Based on that limitation and the amendment
23 limiting the time period from 2012 to the present), the Agency is directed to respond
24 to this request by obtaining responsive information from the Aggrieved Persons
25 with any social media postings describing other causes of emotional distress from
26 2012 to the present time.

1 **"Discovery Related to Alleged Damages**

2 *"Discovery Requested and Objection:*

3 "Respondents moved to compel answers to Interrogatory Nos. 36 and 42.
4 Since the Agency responded to those on August 30, 2016, no further response is
5 necessary.

6 *"Discovery Requested and Objection:*

7 'INTERROGATORY NO. 37: If the Agency contends that any of
8 Respondents is [sic] responsible for emotional distress damages, identify
9 each physician or health care professional who was consulted— whether
10 by the Agency, Aggrieved Person #2, or persons acting on their behalf—
11 with respect to emotional distress damages or other non-economic
12 damages Aggrieved Person #2 allegedly sustained as a result of any action
13 by any of the Respondents.'

14 'INTERROGATORY NO. 38: With respect to each condition of Aggrieved
15 Person #2 state the physician or health care provide [sic] who provided
16 treatment or assessment for any condition relating to the alleged emotional
17 distress.'

18 'INTERROGATORY NO. 39: With respect to each condition of Aggrieved
19 Person #2 state the date(s) of any treatment for any condition relating to the
20 alleged emotional distress.'

21 'INTERROGATORY NO. 40: With respect to each condition of Aggrieved
22 Person #2 state any diagnosis or treatment plan, or recommendations for
23 future treatment relating to the allegations in this case for any condition
24 relating to the alleged emotional distress.'

 "It does not appear that the Agency objects to this request, but rather that it
 has not yet received medical records from the attorney of Aggrieved Person #2.

"Analysis and Ruling:

 "It is not clear why there has been a delay in the Agency obtaining the
 requested documents from Aggrieved Person #2. However, given the rapidly
 approaching hearing date, this information must be provided without further delay.

"Discovery Requested and Objection:

 'INTERROGATORY NO. 20: Identify and describe any and all complaints
 that Aggrieved Person #2 made to anyone regarding their alleged
 experience(s) at Stars, including to whom the complaint(s) was made,

1 whether the complaint(s) was verbal or written, the circumstances, any
2 witnesses, the location where the interaction(s) took place, and any
response(s) received.'

3 'RESPONSE: Aggrieved Person #2 first verbally reported her abuse and
4 harassment to Detective Chad Optiz, of the Beaverton Police Department,
5 during the course of the criminal investigation into Anthony Curry. These
6 reports occurred on or about September 6, 2014.

7 'During the course of the criminal investigation, Aggrieved Person #2 also
8 made a verbal report to REDACTED, of REDACTED, in Portland, Oregon, on or
9 about October 2, 2014. REDACTED is a medical program set up to assess,
10 treat and prevent of child abuse.

11 'Aggrieved Person #2 also stated that she made a verbal disclosure
12 pursuant to a therapy session. Those records will be requested and
13 provided as soon as possible, once received.

14 'Aggrieved Person #2 subsequently verbally reported her abuse and
15 harassment to a Grand Jury, the date of which is unknown, and in open
16 court, on June 4, 2015, in Washington County, Oregon. The criminal
17 defendant was found guilty of his crimes against Aggrieved Person #2 and
18 sent to prison.

19 'Aggrieved Person #2 gradually verbally complained to her mother about
20 her treatment at Respondents' Stars-Beaverton location. She indicated it
21 took a long time to tell her about it.'

22 *"Analysis and Ruling:*

23 "Respondents request an order for the production of documents. However,
24 this is not a request for documents, and the Agency is already required to produce
information in response to Request for Production No. 37-40 regarding medical
treatment. Accordingly, no further response to this interrogatory is required.

"Discovery Requested and Objection:

'Request for Production No. 17: All documents and electronically stored
information that describe, refer, relate to, substantiate or evidence any and
all economic damages for which the Agency alleges any of Respondents is
responsible.'

'Response: The Agency has provided all information within its possession
and control, and not subject to privilege or work product protection, that
relates to any damages sought by the Agency. (Ex. B at 40).'

1 and

2 'REQUEST FOR PRODUCTION NO. 18: All documents and electronically
3 stored information that describe, refer, relate to, substantiate or evidence
4 any and all non-economic damages for which the Agency alleges Stars is
5 responsible.'

6 'Response: The Agency has provided all information currently within its
7 possession, and not subject to privilege or work product protection, that
8 relates to any damages sought by the Agency. Any further information will
9 be provided as soon as possible, once it's received. (Id.)'

10 and

11 'REQUEST FOR PRODUCTION NO. 24: To the extent not already
12 produced in response to the preceding requests, all documents and
13 electronically stored information that concern, support or substantiate, or
14 relate to any alleged loss or damage allegedly sustained as a result of the
15 matters set forth in the Complaint.'

16 'Response: The Agency has provided all materials responsive to this
17 request, and not subject to privilege or work product protection, as part of
18 the discovery previously provided to Respondents. (Ex. B at 42).'

19 *"Analysis and Ruling:*

20 "Since the Agency is not seeking economic damages from Respondents, it
21 need not respond further to Request for Production No. 17.

22 "With regard to Request for Production No. 18, it is not clear why there has
23 been a delay in the Agency obtaining the requested documents from Aggrieved
24 Person #2. However, given the rapidly approaching hearing date, this information
must be provided without further delay.

"With respect to Request for Production No. 24, the Agency indicates it has
produced responsive documents within its possession and it is unclear how this
request differs from Request for Production No. 18. Since the Agency must
produce additional information in response to Request for Production No. 18, no
further response to this request is required.

"Discovery Requested and Objection:

'Request for Production No. 21: All medical and counseling records for the
Aggrieved Persons from 2000 to the present from any institution, physician,
physician's assistant, nurse, chiropractor, psychiatrist, psychologist, health
care professional, alternative or religious health practitioner, mental health

1 professional, employee assistance program or in-home nursing service by
2 whom the Aggrieved Persons have been examined or treated, or with whom
3 the Aggrieved Persons or someone on their behalf consulted.
4 (Respondents make this request to the extent that the documents are in
5 their possession or of any other person cooperating with the Agency or
6 acting or purporting to act on the Agency's behalf. To the extent that these
7 documents are not in the Agency's immediate possession or control or in
8 the immediate possession or control of another state body but rather in the
9 possession of health care providers, the provision of a signed authorization
10 to obtain medical or counseling records and the identity of the health care
11 providers shall be treated as compliance with this request. If a signed
12 authorization is provided please identify any providers of care for physical
13 or mental health by name of institution, address and telephone number,
14 patient number, and dates of employment.)'

15 'Response: The Agency objects to this request as overbroad. The Agency
16 will provide the relevant medical records within its possession.'

17 *"Analysis and Ruling:*

18 "The Agency objects to overbreadth, in particular because the request
19 seeks records dating back to the year 2000 when the Aggrieved Persons would
20 have been just one year old. For purposes of this case and due to the ages of the
21 Aggrieved Persons, the forum finds that Respondents are entitled to responses
22 within the time period of one year prior to the events in the Formal Charges up until
23 present day.

24 *"Discovery Requested and Objection:*

'INTERROGATORY NO. 92: With respect to Complainant's denial of
Requested Admission No. 22 ("that Aggrieved Person #1 has not sustained
any economic damages"), describe the factual basis of this denial and
identify the nature of economic damages incurred.'

'Response: The Agency's Formal Charges do not seek economic damages
on behalf of Aggrieved Person #1, nor does the Agency intend to ask for
economic damages on behalf of Aggrieved Person #1.'

"Analysis and Ruling:

"The Agency has confirmed that it is not seeking economic damages on
behalf of either of the Aggrieved Persons and, thus, need not respond further to
this interrogatory.

1 *"Discovery Requested and Objection:*

2 'Request for Production No. 13: All calendars, diaries, journals, e-mail
3 correspondence, or any personal records or notes that the Aggrieved
4 Persons or any other witnesses created or maintained, including but not
5 limited to any electronically stored information, at any time from 2000 to the
6 present.

7 'Response: The Agency objects to this response as overbroad.'

8 *"Analysis and Ruling:*

9 "The Agency is correct that this request is overbroad. Respondents request
10 that the forum limit the time frame from 2010 to the present, and the scope to
11 include anything related to Respondents, to the mental or emotional [state] of the
12 Aggrieved Persons, or to other sources of emotional distress.

13 "Responsive records regarding Respondents and emotional distress are
14 relevant, but any other responsive material does not meet the forum's relevancy
15 standard.

16 "With respect to time frame, for purposes of this case and due to the ages
17 of the Aggrieved Persons, the forum finds that Respondents are entitled to
18 responses within the time period of one year prior to the events in the Formal
19 Charges up until present day.

20 **"Discovery Regarding Issues of Due Process**

21 "Respondents issued several discovery requests seeking communications
22 between various BOLI employees. Respondents assert that these requests are
23 related to the issues of due process and decision-maker bias. Those include
24 Request for Production Nos. 5-8, 32-35, and 41, and Interrogatory Nos. 73-76, and
25 109. The interrogatories are extremely broadly worded and are not focused on
26 information that is 'reasonably likely to produce information that is generally
27 relevant to the case.' Given that the forum has previously ruled that Respondents
28 have not sustained their burden in showing decision-maker bias, it is unclear how
29 any of this information relates to the case. Accordingly, no further responses to
30 these requests for production and interrogatories are required.

31 **"Allegations of Inconsistent Responses**

32 "Finally, Respondents ask the Agency to 'correct inconsistencies' in some
33 of the discovery responses. The Agency contends that perceived inconsistencies
34 can be created if the Agency 'view[s] evidence one way' and an Aggrieved Person
35 views it differently. Respondents' argument appears to be more of an attack on
36 the credibility of witnesses, rather than insufficient answers to discovery requests.

1 Respondents will have the opportunity to point out any inconsistencies during the
2 hearing. The motion to 'correct inconsistencies' is DENIED.

3 **"SUMMARY OF RULINGS REQUIRING ACTION FROM THE AGENCY"**

4 "The Agency is directed to do the following by September 15, 2016:

5 *Interrogatories*

- 6 • Answer Interrogatory Nos. 37-40, 44, 59, 60, 77, 78, 79, 82, 84, 85, 86,
7 87, 89, 90, 91, 94, 95, 102, 103, 105, 106, 107, 121, 129, and 138.
- 8 • Supplement the answer to Interrogatory No. 24 to answer whether a
9 Freehoo/Beaverton manager expressed a 'expressed a desire to have
10 sex with Aggrieved Person #2.'
- 11 • In response to Interrogatory No. 43, if Aggrieved Person #1 has copies
12 of photo identifications used from 2012 to the present time within her
13 possession, custody or control, copies should be produced.
- 14 • Amend the response to Interrogatory No. 110 to either (1) identify more
15 specific Bates Nos. within 005407-016998 or, alternatively, (2) provide
16 a written explanation as to why this large grouping of documents
17 (005407-016998) demonstrates or tends to support its denial that, 'with
18 regard to the alleged employment of Aggrieved Person #1, Stars
19 Cabaret and Steak House did not follow its regular hiring process for
20 exotic dancers.'
- 21 • Amend the answers to Interrogatories 113 and 115 to answer whether
22 'any person who the Agency contends was an owner, manager,
23 representative or agent' of Freehoo/Beaverton knew of Toth's actions.
- 24 • Amend the response to Interrogatory No. 117 to indicate whether
Aggrieved Person #1 made tips at Freehoo/Beaverton that she shared
with other individuals at the club, such as DJs and security guards.
- Amend the answers to Interrogatory No. 61, 118 and 127 to include the
additional detail contained in the Agency's response to the motion to
compel, signed under oath in accordance with OAR 839-050-0200.
- Amend the answer to Interrogatory No. 128 to include the additional
detail contained in the Agency's response to the motion to compel, and
indicate which clubs it contends Respondents Kaiser, Mitchell and
Struhar had 'particular control over.'

- Amend the answer to Interrogatory No. 65 to indicate what actions, if any, Aggrieved Person #2 did to conceal the fact that she was underage, but the Agency need not respond further.
- Amend the answer to Interrogatory No. 66 to indicate whether any sexual acts occurred on the premises of Freehoo/Stars during the days Aggrieved Person #2 allegedly worked at Freehoo/Stars.

Requests for Production

- The Agency must provide documents responsive to Request for Production No. 13, but may limit its response to documents referencing Respondents and/or emotional distress within the time period of one year prior to the events in the Formal Charges up until present day.
- The Agency must provide documents responsive to Request for Production Nos. 16, 18 and 19.
- The Agency is directed to respond to Request for Production No. 20 by obtaining responsive information from the Aggrieved Persons with any social media postings describing other causes of emotional distress from 2012 to the present time.
- The Agency must provide documents responsive to Request for Production No. 21, but may limit its response to records within the time period of one year prior to the events in the Formal Charges up until present day."

(Exs. X66, X78, X85)

32) After receiving an email from the parties indicating a joint agreement to revise the case schedule, the following deadlines were reset in an interim order dated September 8, 2016:

- The deadline for the Agency and Respondents to produce responsive information/documents to one another in response to rulings made regarding the Agency's and Respondents' motions to compel was moved to September 15, 2016.
- The deadline for filing dispositive motions was moved to September 22, 2016.
- The deadline for filing responses to dispositive motions was moved to October 13, 2016.

(Exs. X84, X86)

1 33) On August 8, 2016, Respondents filed Motions to Strike, to Make More
2 Definite and Certain, and Motions to Dismiss. The Agency filed a response to the motion
3 on August 22, 2016. An interim order was issued on September 14, 2016, which stated,
4 in pertinent part:

5 "The majority of Respondents' motions assert that the Formal Charges lack
6 sufficient specificity to provide Respondents with a more detailed notice to prepare
7 its defense. Adequate notice of an agency action must include a 'short and plain
8 statement of the matters asserted or charged.' ORS 183.415(3)(d); *see also* OAR
9 839-050-0060(1)(b) (a charging document must contain a 'short and concise
10 statement of the matters that constitute the violation'). Formal Charges alleging a
11 civil rights violation must also 'specify the allegations of the complaint to which the
12 respondent will be required to make response.' ORS 659A.845(1).

13 "A violation can be found based on evidence 'reasonably related' to the
14 allegations in the Formal Charges if the evidence either corroborates the Formal
15 Charges or is 'included as a fact underlying a specific charge.' *In the Matter of*
16 *Melissa and Aaron Klein dba Sweetcakes by Melissa*, 34 BOLI 102, 120 (2015),
17 *appeal pending*.

18 "As indicated below, the current motions are not the appropriate procedure
19 for addressing most of the alleged deficiencies that Respondents find with the
20 Formal Charges. Instead, many of the motions (1) raise questions that could be
21 answered through the discovery process or (2) prematurely raise concerns that
22 violations will be found against Respondents based on alleged inadequate notice
23 in the Formal Charges.

24 **"A. Motion to Strike and/or Delete Other Corporate Entities from the
Case Caption/Alternative Motion to Make More Definite and Certain
(Respondents' 'Motion One')"**

1. Motion to Strike

Respondents move to strike the 'AKA entities' from the case caption. The
caption in this case lists only one corporate Respondent: Freehoo, Inc. dba Stars
Cabaret & Steak House ('Freehoo'). Following the identification of Freehoo as a
party, numerous entities are listed, all preceded by the acronym 'aka.'
Respondents assert that the 'AKA entities' should be removed from the caption
since they are not named as parties. In response, the Agency argues that the
Formal Charges 'very clearly identify Freehoo, Inc. as the only corporate entity
respondent,' and that the other entities are ones 'through which Freehoo, Inc.
conducts its business.'

"The forum has previously granted motions to strike when a pleading
contains allegations that are irrelevant or not at issue before the forum. *See, e.g.*
Mountain Forestry, Inc., 29 BOLI 10, 24 (2007), *aff'd without opinion*, *Mountain*
Forestry, Inc. v. Bureau of Labor and Industries, 229 Or App 504, 213 P3d 590

1 (2009). The Agency indicates it will be attempting to argue that the named
2 corporate Respondent, Freehoo, 'conducted business as the' other corporate
3 entities. At the pleading stage of the case -- which essentially requires adequate
4 notice of what statutes or rules a Respondent is accused of violating -- the forum
5 is not convinced that the 'AKA entities' are irrelevant or not at issue before the
6 forum. Accordingly, Respondents' motion is DENIED.

7
8 **"2. Alternative Motion to Make More Definite and Certain**

9 In the alternative, Respondents move to require the Agency to amend the
10 Formal Charges to 'state with specificity how the AKA entities are responsible for
11 unlawful employment practices and, if they can do so properly given BOLI's
12 jurisdictional requirements, to name the appropriate entities as parties.' If the 'AKA
13 entities' were parties, then the Agency would be required to meet the pleading
14 standard set forth in ORS 183.415(3)(d) and ORS 659A.845(1) as to those entities.
15 However, since the Agency has confirmed that the Freehoo is the only corporate
16 Respondent, it need not state how other non-party entities are 'responsible' for any
17 unlawful conduct. Therefore, this motion is also DENIED.

18
19 **"B. Motions to Make More Definite and Certain Allegations Against the
20 Individual Respondents (Respondents' 'Motion Two')**

21 "Respondents request that the Agency specify what statute or
22 administrative rule each Respondent is alleged to have violated, and to identify the
23 alleged acts by each Respondent that the Agency believes to constitute the
24 violations.

"OAR 839-050-0060(1) requires that a charging document issued by the
Agency contain:

- 'a) A reference to the particular statutes or administrative rules involved in
the violation;
- '(b) A short and concise statement of the matters that constitute the
violation; and
- '(c) A statement of the remedies sought and, when appropriate, the penalty
imposed.'

"The Formal Charges adequately meet the due process requirements of OAR 839-
050-0060(1)(a), and motions to make more definite and certain are not the correct
procedural tool for obtaining the information sought by Respondents. See, e.g.
Blachana, LLC, 32 BOLI 220, 223 (2013), *aff'd Blachana, LLC v. Bureau of Labor
and Industries*, 273 Or App 806 (2015), 359 P3d 574 (2015) (discovery was the
appropriate procedure for ascertaining additional information needed to defend the
case); see also *Oregon Department of Fish and Wildlife*, 16 BOLI 263, 264 (1998).
Therefore, this motion is DENIED.

1 **"C. Motion to Strike Paragraph 16/Alternative Motion to Make More**
2 **Definite and Certain (Respondents' 'Motion Three')**

3 "Respondents argue that allegations in paragraph 16 of the Formal Charges
4 'which have no apparent connection to either Aggrieved Person or the underlying
5 Amended Complaint' should be stricken or, alternatively, the forum should require
6 the Agency to make those allegations more definite and certain. Paragraph 16
7 states as follows:

8 'During the course of the Agency's investigation, multiple witnesses
9 described the systematic practice of sexual harassment by Respondents in
10 their workplace, including but not limited to the following:

11 "a. Witnesses stated that dancers engaged in sex acts both inside
12 and outside of the club. These acts were sometime engaged in as
13 part of an individual private dance for money; or occurred after a
14 dancer was 'bought off the floor,' a practice which involved a
15 customer paying the club a specific amount of money to be permitted
16 to take the dance out of the stage rotation, or to have a waitress go
17 off the clock. Witnesses reported that dancers who were 'bought off
18 the floor' were sometimes taken off-site to engage in sexual activities
19 with the purchasing customer.

20 "b. Steven Toth stated, under oath, that while he was employed as
21 a manager for Respondents, he arranged for dancers to engage in
22 prostitution with customers. Steven Toth stated Respondent Todd
23 Mitchell was present during one of these incidents.

24 "c. Witnesses described dancers being groped by managers and
also engaging in sex acts with managers in order to secure better
shifts or other work benefits. Steven Toth also reported that
Respondent Jeff Struhar engaged in sex acts with employee-
dancers both at the club and off site.'

"Respondents specifically take issue with the reference to a "systematic
practice of sexual harassment by Respondents in the workplace." The Agency
argues that the allegations are reasonably related to the commissioner's complaint
and, also, that the facts in Paragraph 16 support the remedies sought in the Formal
Charges. Based on the Agency's explanation, the forum is not convinced that the
facts in Paragraph 16 are irrelevant. Accordingly, the motions to strike Paragraph
16 and/or make more definite and certain are DENIED.

1 **"D. Motion to Require the Agency to Make Paragraphs 22 and 23 More**
2 **Definite and Certain (Respondents' 'Motion Four')"**

3 "Respondents request that the forum require the Agency to clarify the
4 means or manner by which Respondents allegedly discriminated against the
5 Aggrieved Persons, as alleged in Paragraphs 22 and 23 of the Formal Charges.
6 Respondents assert that they are 'entitled to know the form that the alleged
7 discrimination took, and [each Respondent's] alleged role in it * * *.' Paragraphs
8 22 and 23 state as follows:

9 '22. On, about or between September 2012 to December 2012,
10 Respondents, because of Aggrieved Person #1's sex, discriminated against
11 her in compensation or in terms, conditions or privileges of employment, in
12 violation of ORS 659A.030(1)(b), *former and current* OAR 839-005-0021(1),
13 (2) and *former and current* OAR 839-005-0030.

14 '23. On, about or between August 14, 2014 to September 18, 2014,
15 Respondents, because of Aggrieved Person #2's sex, discriminated against
16 her in compensation or in terms, conditions or privileges of employment, in
17 violation of ORS 659A.030(1)(b), *former and current* OAR 839-005-0021(1),
18 (2) and *former and current* OAR 839-005-0030.'

19 "Although the Agency did not specifically address the sufficiency of the
20 allegations in Paragraphs 22 and 23 in its response, the Agency's response
21 generally argues that the Formal Charges comply with the Oregon's Administrative
22 Procedures Act and BOLI's Contested Case Rules. The Agency contends that
23 Respondents request 'additional information beyond the basic requirements' and
24 'offer no actual legal argument to support their suggested new standard of
 pleading.' Th[is] is similar to Respondents' 'Motion Two.' The Formal Charges
 adequately meet the due process requirements of OAR 839-050-0060(1)(a), and
 motions to make more definite and certain are not the correct procedural tool for
 obtaining the information sought by Respondents. Accordingly, this motion is also
 DENIED."

(Exs. X55, X77, X87)

34) Based on an email request received from the parties indicating a joint
agreement to revise the case schedule and a prehearing telephone conference held on
September 15, 2016, the following deadlines were revised in an interim order dated
September 16, 2016:

- The deadline for the Agency and Respondents to produce responsive information/documents to one another in response to rulings made regarding the Agency's and Respondents' motions to compel was changed to September 16, 2016. Medical records of Aggrieved Person #2 that were not available on that date were required to be produced the following week after they are received by the

1 Agency and the Agency has the opportunity to make redactions in accordance with
2 the time periods in the interim order of September 8, 2016.

- 3 • The deadline for filing dispositive motions was moved to September 23, 2016.
- 4 • The deadline for filing responses to dispositive motions was moved to October 14, 2016.

5 (Ex. X88)

6 35) On August 8, 2016, Respondents filed a Motion to Amend Answer and
7 Defenses to Formal Charges and Notice of Hearing. The Agency filed a response to the
8 motion on August 19, 2016. The ALJ issued an interim order ruling on the motion on
September 19, 2016, which stated in pertinent part:

9 “For good cause shown to the administrative law judge, a party may amend
10 its answer at any time before the hearing commences.’ OAR 839-050-0140(3).
11 All of the proposed amendments concern affirmative defenses. Respondents seek
to amend two existing defenses and insert two new affirmative defenses. The
forum recently summarized its precedent on the issue of what is or is not an
appropriate affirmative defense as follows:

12 ‘In general, an affirmative defense is a defense setting up new matter
13 that provides a defense against the Agency's case, assuming all the facts
in the complaint to be true. See, e.g. *Pacificorp v. Union Pacific Railroad*,
14 118 Or App 712, 717, 848 P2d 1249 (1993). A few examples of affirmative
15 defenses previously recognized by this forum include statute of limitations,
claim and issue preclusion, bona fide occupational requirement, undue
16 hardship, laches, and unclean hands. Some other affirmative defenses
17 recognized by Oregon courts include discharge in bankruptcy, duress,
fraud, payment, release, statute of frauds, unconstitutionality, and waiver.
ORCP 19B. In contrast, a defense that admits or denies facts constituting
elements of the Agency's prima facie case that are alleged in the Agency's
18 charging document is not an affirmative defense.’

19 *In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa*, 34 BOLI
20 102, 161 n. 33 (2015), *appeal pending*. The forum has also rejected affirmative
21 defenses that raise matters not at issue before the forum or have no basis in fact.
See, e.g. *Mountain Forestry, Inc.*, 29 BOLI 10, 23-24 (2007), *aff'd without opinion*,
22 *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213
23 P3d 590 (2009).
24

1 **"ANALYSIS OF PROPOSED AMENDMENTS**

2 **"A. Fourteenth Amendment Procedural Due Process**

3 "Respondents seek to add language to paragraph 13 of Section VIII.A of
4 their Answer as follows:⁴¹

5 'The convoluted statutory and regulatory scheme that governs
6 proceedings stemming from Commissioner's complaints, and the
7 Commissioner's ability to enter a final order in this proceeding, the lack of
8 impartiality on the part of the ultimate decision maker(s) including the
9 Commissioner and/or the Deputy Commissioner, the appearance of the
10 Contested Case Coordinator as a witness in this matter, and the associated
11 ex parte communications deprive Respondents of their Fourteenth
12 Amendment procedural due process rights.'

13 Respondents raised these issues in two separate motions before the
14 forum. Their arguments were rejected because Respondents lacked
15 evidence to establish that the decision maker in this case, the Deputy
16 Commissioner, was personally biased against Respondents. See Interim
17 Orders dated 5/31/2016 and 8/25/2016. Since the requested
18 amendments 'ha[ve] no basis in fact,' the motion to insert this language is
19 DENIED. *Mountain Forestry*, 29 BOLI at 23.

20 **"B. Equitable Estoppel**

21 "Respondents request that they be permitted to add the following affirmative
22 defense to section VII. C of their Answer:

23 '17. Aggrieved Person #2, knowing that she was underage, falsely
24 represented that she was 21 years old with the intention that Stars would
25 permit her to dance at the club. Respondents had no knowledge that
26 Aggrieved Person #2 was not the age that she represented herself to be.
27 Stars acted in reliance on Aggrieved Person #2's false representation, to
28 Respondents' detriment. Any claims related to damages allegedly suffered
29 by Aggrieved Person # 2 are barred due to the principles of equitable
30 estoppel.'

31 The forum recently described the doctrine of equitable estoppel as follows:

32 'Estoppel is a legal doctrine whereby one party is foreclosed from
33 proceeding against another when one party has made "a false

34 ⁴¹ Throughout this interim order, the text of Respondents' proposed additions will be underlined and
35 proposed deletions will be crossed out.

1 representation, (1) of which the other party was ignorant, (2) made with the
2 knowledge of the facts, (3) made with the intention that it would induce
3 action by the other party, and (4) that induced the other party to act upon
4 it.” *State ex rel. State Offices for Services to Children and Families v.*
5 *Dennis*, 173 Or App 604, 611, 25 P3d 341 (2001), *citing Keppinger v.*
6 *Hanson Crushing, Inc.*, 161 Or App 424, 428, 983 P.2d 1084 (1999). In
7 order to establish **estoppel** against a **state agency**, a party must have
8 relied on the agency's representations and the party's reliance must have
9 been reasonable. *Id.*, *citing Dept. of Transportation v. Hewett Professional*
10 *Group*, 321 Or 118, 126, 895 P2d 755 (1995).’

11 *Sweetcakes*, 34 BOLI at 171 (emphasis in original). Respondents’ proposed
12 defense does not establish the elements of equitable estoppel for several reasons.

13 “First, the doctrine of equitable estoppel does not fit the procedural posture
14 of this case which is a state agency action brought on behalf of a complainant, the
15 Commissioner. There is no allegation that the Agency made a misrepresentation
16 to Respondents. Accordingly, the allegations do not support the use of equitable
17 estoppel against the Agency.

18 “Second, Respondents have not alleged that their reliance on a
19 misrepresentation was ‘reasonable,’ which is a requirement for asserting such a
20 defense. *Sweetcakes*, 34 BOLI at 171, *citing Dept. of Transportation*, 321 Or at
21 126.

22 “Finally, the facts alleged in this proposed defense more appropriately
23 appear to be a denial of the allegations in Paragraph 20 of the Formal Charges,
24 which alleges that Respondents ‘fail[ed] to adequately vet forms of identification,
and * * * knew or should have known that minors had been or eventually would be
employed in Respondents’ establishments and subjected to sexual harassment in
the workplace.’ A statement which denies an element of the Agency’s case is
viewed as a denial, rather than an affirmative defense. *Sweetcakes*, 34 BOLI at
161.

“Therefore, the request to add equitable estoppel as an affirmative
defense is DENIED.

“C. **Constitutional Right to a Jury Trial**

“Respondents also seek to add the following affirmative defense:

‘17. Forcing Respondents to defend against the Formal Charges
in this forum violates Respondents’ right to a jury trial pursuant to Article I,
§ 17 of the Oregon Constitution.’

“This argument was previously raised by Respondents and addressed by

1 the forum. For the reasons set forth in detail in the interim order of August 25,
2 2016, there is no constitutional entitlement to a jury trial as to the claims under
3 ORS chapter 659A alleged in the Formal Charges. Accordingly, the request to
4 add this defense is also DENIED.

5 *** ** *

6 (Exs. X56, X72, X91)

7 36) On September 22, 2016, Respondents filed an Amended Answer and
8 Defenses to Formal Charges and Notice of Hearing. (Ex. X93)

9 37) On October 4, 2016, a prehearing telephone conference was held at the
10 request of Respondents to discuss a dispute between the parties regarding redactions
11 made to medical records produced by the Agency to Respondents in response to the
12 forum's interim order of September 8, 2016. After the Agency and Respondents were
13 provided with the opportunity to address the issues, the Agency was ordered to submit
14 copies of the medical records in dispute (both redacted and unredacted) to the ALJ for an
15 *in camera* review determine whether the redactions were consistent with the interim order
16 of September 8, 2016. (Ex. X103)

17 38) Respondents filed Respondents' Motion to Amend Protective Order to
18 Include Identifying Information for Non-Party Witnesses Requesting Confidentiality of
19 Their Identities on September 22, 2016. Respondents requested that the Interim
20 Protective Order of April 27, 2016, be amended to include the following:

21 "1. PII [Personal Identifying Information] of Respondents Colburn, Heinzman-
22 Myers, Kaiser, Mitchell, and Struhar as it relates to their responses to the Agency's
23 Interrogatory No. 6; and

24 "2. PII of any witness who testifies or submits declarations about private or
personal matters as described above, including employment at the Club that the
witness seeks to keep private."

The Agency filed a response to the motion on September 30, 2016, asserting that the
information that Respondents seek to protect is too broad and "would have the effect of
essentially protecting the entire hearing from public disclosure." The Agency further
argued that "there is no legal basis for protecting all witnesses to the degree requested
by Respondents." On October 13, 2016, the ALJ issued an interim order which stated, in
pertinent part:

"Respondents seek to add two categories of information to the Interim Protective
Order.

"First, Respondents seek to protect the responses of the individual
Respondents to the Agency's Interrogatory No. 6. Interrogatory No. 6 requested

1 the following information from Respondents Colburn, Heinzman-Myers, Kaiser,
2 Mitchell, and Struhar:

3 'Describe any and all romantic and/or sexual relationships that took place
4 between you and any employee or independent contractor affiliated with
Respondents, including the name of the individual, the dates of the
relationship, and the individual's role in Respondents' business.'

5 "The individual Respondents were ordered to 'answer whether [he or she]
6 had a romantic or sexual relationship with an employee or independent contractor
at Freehoo in the years 2012-2014.' The forum has previously protected private
7 or personal information of the employees of a respondent employer, such as drug
screen reports and medical records. See *In the Matter of Logan International, Ltd.*,
8 26 BOLI 254, 259 (2005); *In the Matter of Sharon Kaye Price*, 21 BOLI 78, 80-81
(2000). The forum has also previously issued a protective order preventing the
9 public disclosure of the legal names of aggrieved persons who requested that their
names be kept private. See *Blachana, LLC*, 32 BOLI 220, 224 (2013), *aff'd*
10 *Blachana, LLC v. Bureau of Labor and Industries*, 273 Or App 806 (2015), ___ P3d
___ (2015). Accordingly, because Interrogatory No. 6 requests private and
11 intimate information about individuals who are not parties to this case, it would be
appropriate to limit the disclosure of the names of the individuals who are named
in Respondents' answers to Interrogatory No. 6.

12 "Second, Respondents seek to protect the disclosure of the PII 'of any
13 witness who testifies or submits declarations about private or personal matters as
described above, including employment at the Club that the witness seeks to keep
14 private.' The Agency asserts that this request is too broad. The forum agrees that
the request extends beyond any protective order that appears to have ever been
15 issued by the forum and, indeed, may not be consistent with Oregon's Public
Records Law. However, as indicated above, the forum has previously limited the
16 disclosure of private or personal information about individuals who were employed
by a respondent employer. Accordingly, if a party submits a declaration signed by
17 a current or former employee who is not a Respondent in this case, that declaration
must be filed under seal in accordance with the terms of the Interim Protective
18 Order. This directive applies to all prehearing filings. The treatment of the names
of witnesses who testify at hearing will be discussed with the parties at a later date
19 in advance of the hearing.

20 "Accordingly, Respondents' Motion to Amend Protective Order is hereby
21 GRANTED IN PART AND DENIED IN PART as explained above."

22 "SUMMARY OF RULING

23 "The interim order of April 27, 2016, is hereby amended to include the
24 following:

1 PII also includes:

2 (1) The names of individuals identified in Respondents'
3 responses to the Agency's Interrogatory No. 6, and

4 (2) The names of any non-party current or former employees of a
5 Stars' establishment who have signed a declaration filed with the
6 forum.

7 When the participants file documents with the PII described above, the
8 original document should be submitted for filing under seal. Additionally, a
9 copy with redactions removing the names of individuals described above
10 should also be filed with the Contested Case Coordinator."

11 In response to a question sent by email from Respondents, the ALJ clarified that the
12 interim order includes individuals that are considered to be either employees or
13 independent contractors. (Exs. X94, X102, X107, X109)

14 39) Respondents filed motions for summary judgment on behalf of all
15 Respondents on September 23, 2016. The Agency filed a response to the motions on
16 October 13, 2016. (Exs. X99, X100, X108)

17 40) Amended Formal Charges were filed on October 19, 2016, removing
18 references to "AKA entities" in the case caption and identifying Frehoo as the only
19 corporate Respondent. (Ex. X112)

20 41) On October 11, 2016, Respondents filed a document with the following
21 motions:

- 22 1. Motion to postpone the hearing scheduled for November 8, 2016;
- 23 2. Motion to postpone the ruling on Respondents' motions for summary judgment;
- 24 3. Motion to reopen and extend the period for informal discovery so that Respondents
"have the opportunity to discover information necessary to assess the truthfulness
and reliability of the remaining BOLI investigator interview accounts"; and
1. Motion to permit Respondents to file a reply brief in response to the Agency's
response to Respondents' motion for summary judgment.

Respondents asserted that the motions were based on their "discovery of falsified and misleading information in [BOLI] interview notes [which] occurred almost simultaneously with the discovery that the Agency inappropriately redacted plainly discoverable information from the Aggrieved Person's medical records." Respondents also asked that the forum "conduct a fact-finding process to assess the validity of the record in this case to determine whether it contains additional falsified or misleading materials." Finally, Respondents requested expedited consideration of their motions, a prehearing telephone conference and a shortening of the Agency's time for responding to the motion. The Agency filed a response to the motion on October 18, 2016, requesting that the forum

1 deny Respondents' motions and order Respondents to produce individuals who have
2 signed declarations at hearing so that they can be cross examined pursuant to OAR 839-
3 050-0260(9). Respondents also filed a "supplemental" motion on October 18, 2016, with
an additional witness declaration. On October 19, 2016, the ALJ issued an interim order
ruling on Respondents' motions which stated, in pertinent part:

4 "First, Respondents contend that they recently discovered that some of the
5 witness interview statements from BOLI investigators 'contain false and/or
6 misleading statements.' Respondents refer to notes from interviews of witnesses
7 named Megan * * *, Hayli * * * and Laurel * * *, and compare information in the
8 interview notes to declarations from those witnesses which appear to contradict
9 some of the statements contained in the interview notes. Respondents assert that
10 the Agency should not rely on the investigation notes from those witness interviews
11 when responding to Respondents' summary judgment motion because those
12 notes are 'unreliable, misleading, and even falsified.' In reviewing the Agency's
13 response to Respondents' motion for summary judgment, it does not appear that
14 the Agency has submitted the notes from the interviews of [Megan], [Hayli] and
15 [Laurel] with its summary judgment response. Accordingly, it does not appear that
16 any action needs to be taken prior to ruling on Respondents' motion for summary
17 judgment.

18 "Secondly, the fact that BOLI interview notes differ from statements in
19 declarations made by witnesses can be pointed out and discussed at the hearing
20 in this matter. There is no prehearing procedure to 'conduct a fact-finding process
21 to assess the validity of the record in this case to determine whether it contains
22 additional falsified or misleading materials.' Respondents' counsel will have the
23 opportunity to cross-examine all of the Agency's witnesses and can point out any
24 discrepancies in documents.

"Finally, Respondents have not provided a reason why the motion was filed
at this date, instead of at an earlier time prior to the deadline. There is nothing to
suggest that the alleged 'false and/or misleading statements' were not contained
in documents produced to Respondents at the beginning of this case.
Respondents' motions do not explain why there is an urgency at this late date to
conduct additional discovery that could have been conducted earlier in the case.⁴²

⁴² In support of their motion, Respondents reference redactions made to medical records that Respondents contend are not consistent with the forum's discovery order. However, it is unclear how the redactions relate to information in the notes of BOLI's investigators, which are the subject matter of these motions. Additionally, Respondents' request to engage in discovery as to who made redactions to medical records does not appear to be reasonably likely to produce information that is generally relevant to the case as required by OAR 839-050-0200(7).

1 "For all of those reasons, Respondents' request for an expedited ruling on
2 their motions is DENIED. However, as indicated above, Respondents may
3 address issues regarding the reliability and accuracy of documents produced by
4 the Agency at the hearing in this matter.

5 **"AGENCY'S REQUEST TO CROSS EXAMINE DECLARANTS**

6 "Respondents have submitted three declarations with its motions and
7 supplemental motions. In its response to the motions, the Agency requested the
8 opportunity to cross examine the witnesses at hearing, pursuant to OAR 839-050-
9 0260(9). The Agency's request is GRANTED. Respondents' declarations will not
10 be received into evidence unless the witnesses appear at hearing so that they can
11 be subject to cross examination."

12 (Exs. X106, X110, X111, X113)

13 42) On October 27, 2016, Respondents filed a motion to extend the time for
14 filing their case summary materials by one day, until October 26, 2016. In response to
15 an email from the ALJ requesting copies of documents which supported the
16 representations in Respondents' motion, supplemental materials were submitted by
17 Respondents on October 28, 2016. The Agency filed a response opposing the motion on
18 October 28, 2016. The ALJ issued an interim order ruling on Respondents' motion on
19 November 1, 2016, which stated, in pertinent part:

20 "The administrative law judge may disregard any document that is filed with
21 the Forum beyond the established number of days for filing.' OAR 839-050-
22 0050(1). It is undisputed that Respondents' case summary and exhibits were filed
23 one day late on October 26, 2016, the date of the postmark from the U.S. Postal
24 Service. OAR 839-050-0040(1). OAR 839-050-0050(3) provides that 'the
administrative law judge may grant [an] extension of time only in situations where
the requesting participant shows good cause for the need for more time or where
no other participant opposes the request.' Under OAR 839-050-0020(16), '[g]ood
cause means, unless otherwise specifically stated, that a participant failed to
perform a required act due to an excusable mistake or a circumstance over which
the participant had no control. "Good cause" does not include a lack of knowledge
of the law, including these rules.'

"This forum has recently summarized the good cause standard as follows:

'To show good cause, Respondents must demonstrate an excusable
mistake or a circumstance over which Respondents had no control. The
excusable mistake or circumstances over which Respondents had no control
means "there must be a superseding or intervening event which prevents
timely compliance." *In the Matter of Ashlanders Senior Foster Care, Inc.*, 14
BOLI 54, 61-62 (1996), *citing In the Matter of City of Umatilla*, 9 BOLI 91
(1990), *affirmed without opinion, City of Umatilla v. Bureau of Labor and*

1 *Industries*, 110 Or App 151, 821 P2d 1134 (1991). The mistaken act or failure to
2 act is excusable if a party mistakenly acts or fails to act due to being misled
3 by facts or circumstances that would mislead a reasonable person under
4 similar circumstances. *Ashlanders*, citing *In the Matter of 60 Minute Tune*,
5 9 BOLI 191 (1991), *affirmed without opinion*, *Nida v. Bureau of Labor and*
6 *Industries*, 119 Or App 174, 822 P2d 974 (1993).'

7 *In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa*, 34 BOLI
8 102, 203 (2015), *appeal pending*. The forum has only found 'good cause' to exist
9 on rare occasions, which generally include a showing that a party took reasonable
10 measures to meet a deadline, but an unforeseen circumstance arose. For
11 example, the forum found 'good cause' to exist when a respondent relied on their
12 attorney to file an answer and an 'electronic glitch' in the attorney's new computer
13 docketing system failed to flag the due date. *In the Matter of Glenn Walters*
14 *Nursery, Inc.*, 11 BOLI 32, 34-35 (1992).

15 "After reviewing the sequence of events described in great detail by
16 Respondents, the forum concludes that Respondents took reasonable steps to
17 meet the case summary deadline, but were faced with unexpected delays caused
18 by third party printing vendors. Respondents hired attorneys to defend this case
19 and prepare its case summary filing. Respondents' counsel assigned [a paralegal]
20 to arrange for the printing of the exhibits.⁴³ When [the paralegal] learned of a
21 printing delay from the first vendor, she immediately contacted another vendor and
22 engaged the help of others in the office to assist with copying and driving to multiple
23 post offices.⁴⁴ Unlike past cases before the forum, Respondents' counsel and
24 counsel's staff not only made initial efforts to meet the filing deadline, but then
proceeded to take multiple additional steps late into the night to attempt to file the
case summary on time. Therefore, Respondents have demonstrated 'good cause'
and their motion for a one-day extension is GRANTED."

(Exs. X116-X124, X128)

43) The Agency filed its case summary on October 25, 2016, and filed an
addendum to the case summary on November 4, 2016. (Exs. X114, X145)

⁴³ The Agency asserts that Respondents should not have waited until the date of filing to contact a printing vendor. However, that does not appear unreasonable in light of the fact that multiple vendors accepted the work after being informed of the deadline.

⁴⁴ To be clear, the forum does not consider a misinterpretation of post office hours to support "good cause" for an extension. See *Green Thumb Landscape & Maintenance, Inc.*, 32 BOLI 185, 189 (2013) (finding no "good cause" when envelope was mailed to the wrong address with insufficient postage). Rather, the problems with third party printing vendors coupled with the totality of the efforts taken after learning of printing delays/errors support a finding of "good cause."

1 44) Respondents' case summary was filed on October 26, 2016. Addendums
2 to the case summary were filed on November 1, 2016, November 3, 2016, and November
7, 2016. (Exs. X116, X127, X139, X155)

3 45) On November 1, 2016, Respondents sent an email to the ALJ and the
4 parties with a copy of Respondents' Motion to Exclude Agency Case Summary, which
5 was subsequently filed with the forum. Respondents' moved to exclude the Agency's
6 case summary filing, asserting that they were prejudiced because the Agency's case
7 summary documents were sent by "media mail" and did not arrive at the office of
8 Respondents' counsel until October 31, 2016, six days after the case summary deadline.
9 On November 2, 2016, the ALJ entered an interim order requiring the Agency to file and
10 serve its response to Respondents' motion no later than noon, November 3, 2016,
11 because Respondents' motion required an expedited ruling prior to the hearing scheduled
to begin on November 8, 2016. The ALJ further required the parties to file and serve all
documents by hand delivery. On November 3, 2016, the Agency filed a response to
Respondents' motion. The ALJ issued an interim order on November 4, 2016, which
denied Respondents' motion, but provided that Respondents may raise objections
regarding individual exhibits or witnesses if they believed they were prejudiced by the
delay caused by the "media mail" postage on the service copy of the Agency's case
summary. (Exs. X114, X130, X131, X141, X146-X148, X150)

12 46) Both the Agency and Respondents filed motions to cross examine authors
13 of declarations and individuals who were interviewed by investigators. The ALJ denied
14 the motions in an interim order issued on November 4, 2016, but noted that the forum
would likely give greater weight to the statements of individuals who testify at hearing and
are subject to cross examination. (Exs. X115, X133, X138, X150)

15 47) On October 28, 2016, the Agency filed a motion in limine to exclude the
16 testimony of a witness identified in Respondents' case summary, a family member who
17 had allegedly abused AP2 in 2010. Respondents filed a response to the motion on
November 2, 2016. The ALJ granted the Agency's motion in an interim order issued on
November 4, 2016. (Exs. X119, X134, X150)

18 48) Respondents filed a motion to exclude the testimony of the Agency's expert
19 for failing to comply with OAR 839-050-0260(1)(b). After Respondents filed their motion,
20 the Agency indicated that it would file an addendum to its case summary with
21 supplemental information about the expert. On November 4, 2016, the ALJ issued an
interim order denying Respondents' motion as moot, but stated the Respondents could
raise the issue again if the supplemental information provided by the Agency was
insufficient under BOLI's contested case rules. (Exs. X132, X150)

22 49) On October 31, 2016, a prehearing telephone conference was held. The
23 conference was originally scheduled to discuss a number of issues in preparation for the
24 hearing set for November 8, 2016. Immediately prior to the hearing, Respondents'
counsel sent an email to the ALJ and all of the parties which stated that Respondent
Frehoo, Inc. "filed for protection under the US Bankruptcy Code in the District of Oregon

1 at approximately 0900 today” and that “the automatic stay under 11 USC 362 is now in
2 effect and precludes post-petition action against the debtor which could have been
3 maintained prior to the filing.” The Agency responded, stating: “The Oregon Department
4 of Justice has indicated that the automatic stay does not apply to our proceeding and that
5 we can move forward with our November 8th hearing. Given the different viewpoints on
6 this issue, the Agency requests that Respondents be required to make a formal filing and
7 the Agency be given the opportunity to respond.”

8 The ALJ informed the parties by email that no action would be taken until a written
9 document was filed with the forum. During the prehearing telephone conference,
10 Respondents were informed that a formal written document should be filed with the forum.
11 Following the conference, Respondents filed a Notice of Bankruptcy with the forum and
12 the Agency filed a response to the Notice on November 2, 2016. On November 3, 2016,
13 the Agency notified the ALJ that a hearing was scheduled in bankruptcy court on
14 November 7, 2016, to address whether the BOLI proceeding was covered by the
15 bankruptcy automatic stay provision.

16 On November 8, 2016, the bankruptcy court entered an order stating that the
17 pending BOLI proceeding was “exempt from the operation of the automatic stay pursuant
18 to 11 U.S.C. § 362(b)(4) as an exercise of the state’s police power which satisfies the
19 pecuniary purpose test.” The bankruptcy court order further stated that the exemption
20 did not allow for collection or enforcement, and that BOLI should not take any collection
21 or enforcement action against Frehoo beyond filing a proof of claim in the bankruptcy
22 court without further order of the bankruptcy court. (Exs. X125, X126, X129, X144, X157)

23 50) On November 2, 2016, Respondents filed an Emergency Motion for Set-
24 Over due to the pending bankruptcy hearing. The Agency indicated by email that it did
not oppose the motion. On November 4, 2016, the ALJ entered an interim order setting
the case over for one day, and the hearing was scheduled to begin November 9, 2016.
(Exs. X135, X142, X150, X154)

51) In an interim order issued on November 4, 2016, the parties were informed
that the ALJ would be granting Respondents’ motions for summary judgment to dismiss
Respondents Pamela Colburn and Lisa Heinzman-Myers, and would be denying the
remainder of the motions. The forum issued an interim order on November 8, 2016, ruling
on Respondents’ motions for summary judgment, which stated, in pertinent part:

“INTRODUCTION

“On March 31, 2016, the Agency issued Formal Charges against
Respondents. Amended Formal Charges were filed on October 19, 2016,
removing references to ‘AKA entities’ in the case caption. Respondent filed an
answer to the Formal Charges on April 20, 2016, and filed an Amended Answer
on September 22, 2016. The Amended Formal Charges allege that Respondents
discriminated against both Aggrieved Persons in compensation or in terms,
conditions or privileges of employment, in violation of ORS 659A.030(1)(b), *former*

1 and *current* OAR 839-005-0021(1), (2) and *former and current* OAR 839-005-
2 0030. ORS 659A.030(1)(b) states, in pertinent part, that it is an unlawful
3 employment practice '[f]or an employer, because of an individual's *** sex *** to
4 discriminate against the individual in compensation or in terms, conditions or
5 privileges of employment.' The Amended Formal Charges also allege that all of
the individual Respondents 'aided, abetted, incited, compelled and/or coerced acts
forbidden under ORS chapter 659A, specifically the unlawful practices alleged
here, and [are] individually liable for violations alleged herein as an aider and
abettor pursuant to ORS 659A.030(1)(g).'

6 Respondents filed motions for summary judgment on behalf of all
7 Respondents on September 23, 2016. The Agency filed a timely response to the
motions on October 13, 2016.⁴⁵

8 **"SUMMARY JUDGMENT STANDARD**

9 "A motion for summary judgment may be granted where no genuine issue
10 as to any material fact exists and a participant is entitled to a judgment as a matter
of law, as to all or any part of the proceedings. OAR 839-050-0150(4)(B). The
11 standard for determining if a genuine issue of material fact exists and the
evidentiary burden on the participants is as follows:

12 '*** No genuine issue as to a material fact exists if, based upon the
13 record before the court viewed in a manner most favorable to the
adverse party, no objectively reasonable juror could return a verdict
14 for the adverse party on the matter that is the subject of the motion
for summary judgment. The adverse party has the burden of
15 producing evidence on any issue raised in the motion as to which the
adverse party would have the burden of persuasion at [hearing].'

16 ORCP 47C.

17 "The record considered by the forum in deciding this motion consists of: (1)
the Agency's Amended Formal Charges; (2) Respondents' Amended Answer; (3)
18 Respondents' argument made in support of its motions and the exhibits submitted
with Respondents' motions, and (4) the Agency's argument opposing
19 Respondents' motions, and the exhibits submitted with the Agency's response.

20 **"DISCUSSION**

21 "Respondents raised the follow[ing] motions for summary judgment:
22

23
24 ⁴⁵ The interim order of May 16, 2016, extended the deadline for responding to motions to 14 days.

1. Respondent Frehoo, Inc. dba Stars Cabaret & Steak House ('Frehoo') should be granted summary judgment as to Aggrieved Person #2's claim of sexual harassment because Frehoo did not know nor should it have known of her 'alleged touching by a patron, which she did not report.'
2. Respondent Frehoo should be granted summary judgment regarding Aggrieved Person #2's 'claim in so far as it is based on taking her clothes off or being looked at by a supervisor.'
3. Respondent Frehoo should be granted summary judgment as to claims concerning Aggrieved Person #1 because Frehoo was not her 'employer' under ORS 659A.001(4).
4. Respondent Frehoo should be granted summary judgment as to the agency's request for injunctive relief because the business is closed.
5. The forum should grant summary judgment to the extent that any of the claims or relief sought relate to corporate entities other than Frehoo.
6. The forum should dismiss the claims seeking damages for the Aggrieved Persons because they are not 'Complainants.'
7. All of the individual Respondents are entitled to summary judgment as to the charges of aiding and abetting.

"Following is a discussion and analysis of each of Respondents' motions.

"A. Aggrieved Person #2's Claim of Sexual Harassment Due to Alleged Touching by a Patron

"Respondents move for summary judgment as to the claims of Aggrieved Person #2 because 'the harassment claim appears to be based on a few instances of alleged unwelcome touching by a customer, * * * which it is undisputed that [Aggrieved Person #2] failed to report.' In response, the Agency argues that 'asking a child to take off her clothes, for the entertainment of adult customers, whether it involves overt sex acts or "simply" the lewd exhibition of body parts' meets the criteria for sexual harassment. The Agency further states that a child cannot consent to a sex act, citing ORS 163.315(1).

"Sexual harassment' is defined as follows:

'(1) Sexual harassment is unlawful discrimination on the basis of sex and includes the following types of conduct:

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

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

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

3 (b) Any unwelcome verbal or physical conduct that is sufficiently
4 severe or pervasive to have the purpose or effect of unreasonably
interfering with work performance or creating a hostile, intimidating
or offensive working environment.'

5 OAR 839-005-0030. In this case, there is evidence that Aggrieved Person #2 had
6 to submit to 'conduct of a sexual nature when such conduct is directed toward an
individual because of [her] sex' when she performed nude dancing for the purpose
7 of entertaining adults at Frehoo. Accordingly, the forum must determine whether
that conduct was 'unwelcome.'

8 "When the Agency argues that Aggrieved Person #2 was incapable of
9 consenting to sexual acts under ORS 163.315(1),⁴⁶ the Agency is essentially
arguing that the conduct was 'unwelcome.' Courts that have considered this issue
10 have held that 'the age of consent in the state in which [an individual] is employed'
determines whether sexual conduct was 'welcome.' *EEOC v Finish Line, Inc*, 915
11 F Supp 2d 904, 917 (MD Tenn 2013), *quoting Doe v. Oberweis Dairy*, 456 F.3d
704, 713 (7th Cir 2006). These cases are consistent with an Oregon Court of
12 Appeals opinion which held that 'a person's incapacity to consent under ORS
163.315(1) extends to civil cases.' *Wilson v Tobiassen*, 97 Or App 527, 534, 777
13 P2d 1379, 1384 (1989), *rev den*, 308 Or 500 (1989). Accordingly, it is reasonable
to extend the age of consent in ORS 163.315(1) to this administrative proceeding,
14 which would render any sexual conduct involving Aggrieved Person #2 as
'unwelcome.' Therefore, Respondents have not demonstrated that, as a matter of
law, Aggrieved Person #2 was not subjected to sexual harassment.

15 "Respondents also assert that Frehoo did not know, nor should it have
16 known, of any sexual harassment of Aggrieved Person # 2. An employer can be
held liable for harassment if the employer knew or should have known of the
17 conduct and fails to take immediate and appropriate corrective action. *In the*
Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 153 (2000).⁴⁷ There is a disputed
18 issue of fact in this case as to whether Respondents should have taken greater
care in checking the identification presented by Aggrieved Person #2 to determine
19 whether she was over the age of 18 and eligible to dance nude for entertainment
purposes. Therefore, this motion is DENIED.

21 ⁴⁶ Under Oregon law, a person under the age of 18 is "incapable of consenting to a sexual act." ORS
22 163.315(1)(a). As well, it is illegal to use a person who is less than 18 years of age in a display of sexually
explicit conduct. ORS 163.670(1); 163.665(1). The definition of "sexually explicit conduct" includes "actual
23 or simulated * * * [l]ewd exhibit of sexual or other intimate parts." ORS 163.665(3)(f). Oregon also prohibits
exhibiting an obscene performance to a minor. ORS 167.075(1).

24 ⁴⁷ If the harassment is from a supervisor, there is a presumption that the employer should have known of
the harassment, but there is no presumption if the harassment was from a non-employee. *Id.*

1 **"B. Aggrieved Person #2's Claim 'Based on Taking Her Clothes Off or**
2 **Being Looked at By a Supervisor'**

3 "Respondents assert that Aggrieved Person # 2 cannot base her sexual
4 harassment claim on the fact that she took her clothes off or was watched by a
5 supervisor while dancing nude because those things were an integral part of her
6 work as a dancer. As previously stated, Aggrieved Person #2 was under the age
7 of 18 when she danced nude at Frehoo in front of adults for entertainment
8 purposes, and there is a disputed fact as to whether Respondents knew or should
9 have known that she was underage. Therefore, Respondents have not
10 demonstrated that they are entitled to summary judgment as a matter of law and
11 this motion is also DENIED.

12 **"C. * * * * *⁴⁸**

13 **"D. Agency's Request for Injunctive Relief**

14 "In the Amended Formal Charges, the Agency seeks an injunction against
15 'Respondents, their agents, employees and successors' pursuant to ORS
16 659A.030(1)(b), OAR 839-005-0021 and OAR 839-005-0030. Respondents
17 request summary judgment on behalf of Frehoo, its 'agents,' and 'employees'
18 because Frehoo ceased operations on July 31, 2016. Respondents argue that
19 because the purpose of an injunction is to prevent future harm, the need for
20 injunctive relief as 'set forth on page 20, paragraph 3 of the Formal Charges' is
21 moot due to the closure of the business. In response, the Agency produced
22 evidence that there are indications that, as of September 28, 2016, the Frehoo
23 location in Beaverton was still set up as a business and 'could resume operations
24 at that location with little or no delay.'⁴⁹ (Agency Ex. C, Lynch Decl., ¶ 7) More
specifically, Lynch observed:

- Seating, privacy curtains, glassware and bottles of alcohol appeared ready for use.
- Sound equipment in the DJ booth was powered on and appeared ready for use.
- Pilot lights were burning on a gas range in the kitchen.
- In an office, a video monitoring system and a computer were powered on.

Id. As well, Frehoo is listed as an active business with the Corporation Division of Oregon's Secretary of State. (Agency Ex. H)

⁴⁸ This section related to claims involving AP1. All of those claims have since been resolved by the parties.

⁴⁹The Agency also made an argument based on ORS 659A.850(4) which is not cited on page 20, paragraph 3 of the Amended Formal Charges and, thus, was not considered when ruling on Respondents' motion.

1 "When recently faced with the question of nonmonetary relief after the
2 closure of a respondent's business, the Commissioner ruled as follows:

3 "[T]he nonmonetary remedies sought by the Agency would be a futile
4 exercise of the forum's authority, given that *Respondent MBI is no longer
doing business in Oregon and that there is no indication in the record that
MBI has any intention of resuming business in Oregon in the future.*'

5 *In the Matter of Maltby Biocontrol, Inc.*, 2014 BOLI 121, 157 (2014) (emphasis
6 added). By contrast, in this case there is evidence on the record in the Lynch
7 Declaration, as described above, which creates a question of fact as to whether
there is 'an intention [to] resum[e] business in Oregon in the future.' Accordingly,
Respondents' Fifth Motion for Summary Judgment is DENIED.

8 **"E. Claims Related to Corporate Entities Other Than Frehoo**

9 "Respondents request that the forum 'grant summary judgment to the extent
10 that any of the claims or relief sought related to corporate entities other than
11 Frehoo.' This argument was based on the caption in the original Formal Charges
which named Frehoo as the only corporate Respondent. The identification of
12 Frehoo as a party was followed by the listing of numerous other corporate entities,
which were preceded by the acronym 'aka.' The Agency did not object to
13 Respondents' argument in its response and recently filed Amended Formal
Charges which 'remove[d] the "aka" entities.' Accordingly, because the 'AKA
14 entities' have been removed from the caption and there are no claims made
against any corporate entities other than Frehoo, Respondents' motion is DENIED
AS MOOT.

15 **"F. Damage Claims on Behalf of Aggrieved Persons who are not
16 Complainants**

17 "The Agency seeks damages for each Aggrieved Person in the amount of
\$4,000,000 under ORS 659A.850. Respondents assert that the forum has no
18 authority to award damages because the Aggrieved Persons are not complainants
and ORS 659A.850(4)(b) refers to 'paying award of actual damages suffered by
19 the *complainant*.' (Emphasis added). In response, the Agency points out that the
language in ORS 659A.850(4)(b) referencing 'damages suffered by the
20 complainant' is preceded by the phrase 'including but not limited to * * *.' The
Agency also cites to past cases awarding damages to an aggrieved person and
21 legislative history. See, e.g. *Blachana, LLC*, 32 BOLI 220 (2013), *aff'd Blachana,
LLC v. Bureau of Labor and Industries*, 273 Or App 806 (2015), 359 P3d 574
22 (2015), *opinion adh'd to as modified on recons sub nom. Blachana, LLC v. Oregon
Bureau of Labor & Indus.*, 275 Or App 46 (2015).

1 "A BOLI Final Order 'may require that the respondent:

2 '(a) Perform an act or series of acts designated * * * that are reasonably
3 calculated to:

4 '(A) Carry out the purposes of [ORS chapter 659A];

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

7 '(C) Protect the rights of the complainant and other persons similarly
8 situated * * *'

9 ORS 659A.850(4) (emphasis added). The Oregon Supreme Court recently stated
10 that the phrases 'includes' and 'including but not limited to' indicate that 'the
legislature likely intended a nonexclusive meaning.' *Sather v. SAIF Corp*, 357 Or
11 122, 134, 347 P3d 326 (2015). In other words, the reference to 'actual damages
suffered by the complainant' does not mean 'that the specific examples constitute
12 the universe of items to which the general term refers; rather, it means only that
our interpretation of the general term includes consideration of those specific
13 examples.' *Schmidt v. Mt Angel Abbey*, 347 Or 389, 404, 223 P3d 399 (2009).
Accordingly, the reference in ORS 659A.850(4)(b) to 'damages suffered by
14 complainant' includes that specific example, but does not *exclude* an award of
damages to an aggrieved person. Thus, BOLI's interpretation is consistent with
15 how the Supreme Court has interpreted similar phrases in *Sather* and *Schmidt*.
Therefore, Respondents' motion to dismiss the claims requesting damages on
behalf of the Aggrieved Persons is DENIED.

16 **"G. Aiding and Abetting Allegations against the Individual Respondents**

17 "ORS 659A.030(1)(g) provides that it is an unlawful employment practice
18 '[f]or any person, whether an employer or an employee, to aid, abet * * * the doing
of any of the acts forbidden under this chapter or to attempt to do so.' 'Person'
19 includes 'individuals.' ORS 659A.001(9)(a). 'Aiding and abetting, in the context of
an unlawful employment practice, means to help, assist, or facilitate the
20 commission of an unlawful employment practice, promote the accomplishment
thereof, help in advancing or bring it about, or encourage, counsel or incite as to
its commission.' *Maltby*, 33 BOLI at 151 (internal citations omitted). 'A corporate
21 officer and owner who commits acts rendering the corporation liable for an unlawful
employment practice may be found to have aided and abetted the corporation's
22 unlawful employment practice.' *Hey Beautiful Enterprises, Ltd.*, 34 BOLI 80, 97
(2015). *See also In the Matter of Crystal Springs Landscapes, Inc.*, 32 BOLI 144,
23 166-67 (2012); *In the Matter of Dr. Andrew Engel, DMD, PC*, 32 BOLI 94, 137
(2012); *In the Matter of Cyber Center, Inc.*, 32 BOLI 11, 35 (2012). Aiding and
24

1 abetting, in the context of an unlawful employment practice, means 'to help, assist,
2 or facilitate the commission of an unlawful employment practice, promote the
accomplishment thereof, help in advancing or bring it about, or encourage, counsel
or incite as to its commission.' *Hey Beautiful*, 80 BOLI at 97.

3
4 "Respondents assert that aiding and abetting requires active participation
in an unlawful act, and Respondents cannot be liable simply because of their
ownership interests or positions in the organization. In response, the Agency
5 asserts that the individual Respondents can be liable for '[t]heir complete
indifference and inaction to monitor and remedy the situation.'

6
7 "1. Facts Regarding the Individual Respondents

8 "Following is a summary of the facts regarding each individual
Respondent.⁵⁰

9 "*Colburn and Heinzman-Myers*

10 "Colburn and Heinzman-Myers own interests in corporations that own NPC
Concepts ('NPC'). NPC holds a 100% ownership stake in Frehoo. Colburn and
11 Heinzman-Myers both live in Colorado. Heinzman-Myers has not visited Oregon
since 1976. These individuals are not involved in recordkeeping for Frehoo and
12 have no knowledge of, or responsibility for, creating or enforcing policies. These
individuals did not know of any conduct involving the Aggrieved Persons until after
13 suspects were arrested. The Agency has admitted that it has no 'evidence or
information in [its] possession or knowledge that demonstrates or tends to show
14 that either' Colburn or Heinzman-Myers 'has ever played an active role in the
management of [Frehoo] or in the development of any of its employment policies.'
15 (Resp. Ex. 20, Interrogatory Response #32)

16 "*Herkenrath*

17 "Herkenrath began working for Frehoo in December 2010, and performed
on-site management duties beginning in 2012. During the time Aggrieved Person
18 #1 was allegedly at the club, Herkenrath worked part-time as a manager on the
day shift, and also worked as a security person. He recalls seeing Aggrieved
19 Person #1 with Toth on one occasion. Herkenrath has known Toth since
Herkenrath was ten years old. Toth told Herkenrath about the initial job opportunity
20 to work for Frehoo.

21
22
23 ⁵⁰ For purposes of this summary judgment motion, the facts are presented in the light most favorable to the
Agency, the nonmoving party. Accordingly, not all facts Respondents discussed in their motions are
24 included.

1 "Herkenrath was present when Aggrieved Person #2 applied for a position
2 at Frehoo, but he was not the manager on duty.

3 "Kaiser

4 "Kaiser holds an ownership in Frehoo through his interest in RKG Holdings,
5 Inc. During the events at issue in this case, Kaiser was responsible for overseeing
6 the management of Stars Cabaret in Bend, Oregon, where he lives. He also
7 generally oversees the financial, corporate and legal matters that affect for clubs
8 in Oregon, including Frehoo. He was not generally involved in the day-to-day
9 management of Frehoo. Kaiser never had any contact with the Aggrieved
10 Persons.

11 "Mitchell

12 "Mitchell has an ownership interest in Frehoo through his interest in SHM
13 Holdings, Inc. He is the corporate secretary of Frehoo. He was the corporate
14 officer designated to oversee the management of Frehoo. In 2012, prior to the
15 time that Aggrieved Person #1 was allegedly on Frehoo's premises, Frehoo hired
16 an investigator to determine whether entertainers were engaging in prostitution,
17 and to ensure the security was doing its job. At the time that Toth was arrested,
18 Mitchell had never received any complaints that Toth sexually harassed anyone.
19 The last communication Mitchell had with Toth was to send him a letter terminating
20 his employment with Stars-Bridgeport, the location where Toth worked at the time
21 of his arrest.

22 "Mitchell never had any contact with Aggrieved Person #2. During 2012
23 through 2014, Mitchell had a romantic/sexual relationship with a woman who
24 worked as an entertainer at Frehoo.

"Struhar

"Struhar has an ownership interest in Frehoo through his interest in JMS
Holdings, Inc., and is the corporate president of Frehoo. He has the ability to
exercise management control at Frehoo, and has a romantic or sexual relationship
with a Stars entertainer. Lynch Decl., p. 4.

2. Analysis and Ruling

"The forum agrees with the Agency that sometimes the failure to take action
can support a claim for aiding and abetting. *See, e.g. Alch v Superior Court*, 122
Cal App 4th 339, 389, 19 Cal Rptr 3d 29, 67 (2004) (under California law, talent
agency could be liable for aiding and abetting an employer's age discrimination
violation if talent agency gave 'substantial assistance or encouragement' to the
employer); *Hurley v Atl City Police Dep't*, 174 F3d 95, 126 (3d Cir 1999) (under
New Jersey law, 'inaction can form the basis of aiding and abetting liability if it rises

1 to the level of providing substantial assistance or encouragement’); *Chapin v. Univ.*
2 *of Mass.*, 977 F Supp 72, 78 (D.Mass.1997) (holding that the inaction of a
3 supervisor who is aware of sexual harassment is aiding and abetting in violation of
4 Massachusetts law).

5 “With respect to Respondents Herkenrath, Kaiser, Mitchell and Struhar,
6 there is evidence that they had management control over Frehoo and may have
7 failed to take action to prevent conduct at Frehoo which led to the events involving
8 the Aggrieved Persons. However, there is no evidence to demonstrate that
9 Colburn and Heinzman-Myers (who both reside in Colorado) had any involvement
10 with Frehoo other than financial interests. Accordingly, Respondents’ motion to
11 dismiss Colburn and Heinzman-Myers is GRANTED, and the motion as to the
12 remaining individual Respondents is DENIED.”

13 (Exs. X150, X156) The ALJ’s ruling on Respondents’ motion for summary judgment is
14 hereby CONFIRMED.

15 52) At the start of the hearing on November 9, 2016, the ALJ orally advised the
16 Agency and Respondents of the issues to be addressed, the matters to be proved, and
17 the procedures governing the conduct of the hearing. (Hearing Record)

18 53) To comply with the terms of the interim protective orders, throughout the
19 hearing the aggrieved persons were referred to as AP1 and AP2 instead of their actual
20 names. However, when AP1 and AP2 testified, their actual first names were used, but
21 were not included in the transcript. With the exception of the named Respondents,
22 Frehoo’s employees and alleged independent contractors were referred to by their first
23 names. When the medical records of AP1 and AP2 were discussed, any hearing
24 observers who had not certified that they had read and agreed to the terms of the interim
protective orders were asked to leave the room. (Hearing Record)

54) On November 14, 2016, the parties submitted a Joint Stipulation of Exhibits
identifying exhibits that all the parties agreed should be admitted into evidence. (Ex.
X158)

55) During the hearing, the ALJ sustained Respondents’ objections to the audio
recording of the BOLI interview of Nathan Wheeler (Ex. A28) because it contained
material that was irrelevant, immaterial, repetitious and unreliable. Additionally, because
Wheeler did not testify in person, Respondents did not have an opportunity to cross
examine the witness. (Hearing Record)

56) The Agency attempted to offer evidence of sexual harassment at the Stars
Salem location through the testimony of Chris Lynch. Respondents objected to this
evidence on the basis of relevancy. The ALJ permitted Lynch to testify as to this evidence

1 through an offer of proof. At the conclusion of the offer of proof, the ALJ sustained
2 Respondents' objection because there was insufficient evidence on the record as to when
3 the incident happened and how the management of the Salem club related to Frehoo.
(Hearing Record)

4 57) On November 23, 2016, the ALJ issued an interim order which stated:

5 **"INTRODUCTION**

6 "The following summarizes rulings made during the hearing, as well as
7 additional directives that will apply to the case when the hearing resumes.

8 **"HEARING DATES**

9 "The hearing in this case began on November [9], 2016, and went into
10 recess before noon on November 18, 2016, after the Agency indicated it had no
11 additional witnesses available to testify that day. The hearing will resume at **9:00**
a.m. on Tuesday, November 29, 2016, and will continue until December 7,
12 **2016.** At this time, the hearing facility is not available after December 7, 2016.
The parties were informed that they needed to work towards December 7, 2016,
as the ending date for the presentation of witness testimony and evidence. If
necessary, the ALJ will arrange for closing arguments to be made on another date
at another location.

13 "At 4:00 p.m. on Monday, November 28, 2016, the parties will have access
14 to the hearing room to set up for hearing the next day.

15 **"WITNESS TESTIMONY**

16 "The Agency has indicated that it will call its expert witness to testify on
17 November 29, 2016, and that this testimony (including direct, cross examination
and re-direct) will last the entire day. Respondents have asserted that it seems
unlikely that this testimony will last the entire day, and have requested that the
Agency be prepared to have additional witnesses lined up. The Agency was
18 instructed to disclose any additional witnesses to Respondents by noon on
Monday, November 28, 2016.

19 "Furthermore, this hearing has progressed much slower than anticipated by
20 the parties. Accordingly, the following procedures will be implemented going
21 forward to help move the case along more expeditiously:

- 22 • When presenting their respective cases, both the Agency and Respondents
23 should fill the entire day with witness testimony and avoid 'dead spots,'
except for the usual mid-morning, lunch and mid-afternoon breaks. The
24 parties will be expected to have additional witnesses ready in the event the
testimony of a witness proceeds more quickly than anticipated. If a party

1 does not have a witness lined up, they should be prepared to explain why
2 there is 'good cause' for the lack of a witness.

- 3 • In order to avoid 'unduly repetitious evidence' under OAR 839-050-0260(2),
4 the parties will be discouraged from asking testifying witnesses to
5 summarize statements made by other witnesses who will also be testifying
6 at the hearing. In other words, in most circumstances information should
7 be presented with live testimony, rather than by having one witness read a
8 lengthy summary statement of another witness who will also be coming in
9 to testify.
- When the hearing resumes after the lunch hour break each day at
approximately 1:00 p.m., the parties will be asked to identify the witnesses
they intend to call the following day.
- On the morning of November 29, 2016, the Agency will be asked to provide
an updated estimate as to when its case-in-chief will be complete, and
Respondents will be asked for an estimation of how long its case will take.

11 **"STRICKEN TESTIMONY OF DET. OPITZ**

12 "After the conclusion of the Agency's direct examination of Beaverton Police
13 Det. Chad Opitz, Lauren Mehrrens, an attorney from the Beaverton City Attorney's
14 Office, appeared and asked to be heard. Ms. Mehrrens stated that she would be
15 instructing Det. Opitz not to answer any questions regarding a pending criminal
16 investigation. The Agency had asked some questions about this investigation in
17 its direct examination of Det. Opitz and, thus, Respondents were effectively
prevented from having an opportunity to conduct cross examination on that
subject. Accordingly, the portion of the direct testimony of Det. Opitz on that topic
was stricken from the record. The court reporter provided the forum with a
transcript of that testimony, and copies of the transcript were provided to the
Agency, Respondents, and Ms. Mehrrens.

18 "The Agency was provided with the opportunity to file a legal brief or motion
19 as to why the stricken testimony should be admitted. The brief must be emailed
20 to Respondents, Ms. Mehrrens and the ALJ by 5:00 p.m. on Monday, November
21 28, 2016. The original, hard copy for the forum file may be delivered to the ALJ on
22 the morning of November 29, 2016.

23 "Respondents and the Beaverton City Attorney may file responses to the
24 Agency's briefing. Responses must be emailed to the Agency, the Beaverton City
Attorney's office and the ALJ by noon on Thursday, December 1, 2016. The
original, hard copy for the forum file may be delivered to the ALJ on the morning
of December 2, 2016."

(Exs. X159, X160)

1 58) The Agency filed a Motion to Allow Evidence of Third Party Minor Dancer
2 on November 28, 2016. Respondents and the City of Beaverton filed responses to the
3 Agency's motion on December 1, 2016. On December 6, 2016, the ALJ announced on
4 the record that the Agency's motion was denied because there was no way to predict
5 whether Det. Opitz would need to rely on records which were determined to be exempt
6 from disclosure under ORS 192.501 to 192.505 to answer questions on cross
7 examination, in violation of the public officer privilege of ORS 40.270. If he could not
8 answer questions due to privilege, then Respondents would not have the opportunity to
9 fully and completely cross examine the witness. (Exs. X161, X162, X163; Hearing
10 Record)

11 59) Throughout its case-in-chief, Respondents attempted to offer the testimony
12 of witnesses who were not listed on their case summary and the Agency objected.
13 Respondents were unable to establish that the witnesses met the standard for an
14 "impeachment" witness. However, the ALJ allowed the witnesses to testify when
15 Respondents established that the Agency offered witness testimony that differed from
16 what was provided in discovery and, thus, Respondents would not have had advance
17 notice of the need to list the "impeachment" witnesses in their case summary. (Hearing
18 Record)

19 60) During the hearing, the Agency requested copies of email communications
20 between Kaiser and Herkenrath. Respondents asserted that the emails were protected
21 by attorney client and work product privileges. At the ALJ's request, Respondents
22 produced copies of the emails for *in camera* inspection. The ALJ ruled that one email
23 was covered by attorney client privilege and need not be produced. With respect to an
24 email subject to the work product privilege, which is not absolute, the ALJ did not find a
substantial need for the document to be produced. (Hearing Record)

1 61) At the conclusion of the evidentiary portion of the hearing, the ALJ and the
2 parties discussed the filing of post-hearing briefs on matters which arose during the
3 hearing, including motions made by Respondents at the conclusion of the Agency's case-
4 in-chief. On December 12, 2016, the parties were provided with a copy of an excerpt
5 from the proceedings on December 1, 2016, which included discussion of the issues. On
6 December 13, 2016, the ALJ issued an interim order allowing the parties to file briefs
7 regarding cases cited in the hearing by Respondents and the offer of proof regarding
8 witness Alexa/"Satine" no later than December 19, 2016. The Agency and Respondents
9 filed post-hearing briefs on December 19, 2016. (Exs. X164 - X166)

10 62) In response to a question from the Agency, the ALJ sent an email to the
11 parties on December 19, 2016, which lifted the requirement that documents had to be
12 filed and served by hand delivery. (Ex. X167)

13 63) On December 19, 2016, the ALJ sent an email to the parties which stated,
14 in pertinent part:

1 "As discussed at the end of the evidentiary portion of the hearing in this matter,
2 closing arguments will take place at BOLI's Portland office at the address below
3 on **Wednesday, December 21, 2016**. The proceedings will begin at **9:00 a.m.**
(note that this is a half hour change from what was previously discussed). The
parties may access the hearing room after 8:00 a.m. to set up their materials.

4 "Each side's closing arguments will be limited to 90 minutes, and the Agency will
5 have 15 minutes at the end for rebuttal closing arguments.

6 "If the parties intend to make any video or PowerPoint presentations, they should
7 be prepared with their own equipment and should bring copies of any materials
that are presented on screen."

(Ex. X168)

8 64) On December 20, 2016, the ALJ sent an email to the parties which stated,
9 in pertinent part:

10 "Following are the forum's interim rulings after reviewing the parties' post-hearing
11 briefs:

12 "1. Respondents' motions for judgment as a matter of law are DENIED.
The issues raised in the motions will be addressed in the Proposed and
13 Final Orders.

14 "2. The testimony of witness Alexa/'Satine' is not admitted into evidence.
This witness was not identified in Respondents' case summary and was
15 labeled as an 'impeachment' witness. Impeachment by extrinsic evidence,
e.g. testimony of a witness or by introduction of an exhibit, can be used to
16 show bias, interest, prejudice, improper motive, a witness's ability to
perceive or remember, prior inconsistent conduct and prior inconsistent
17 statements directly related to a relevant issue, and conviction of a crime as
set out in OEC 609. Respondents did not demonstrate that this witness
18 testimony met any of the categories of 'impeachment' evidence set forth in
OEC 609.

19 "Respondents also asserted that this witness was first named in the hearing
testimony of Steve Toth and was not disclosed in response to discovery
20 requests. The ALJ has the authority to take appropriate remedial action
when relevant information is not produced in response to a discovery order.
21 See, e.g. *In the Matter of Columbia Components, Inc.*, 32 BOLI 257, 263-
64 (2013). However, in this circumstance, although the Agency was asked
22 to identify the names of any witnesses, there is no information to indicate
that the Agency knew of the name of this witness prior to Toth's testimony
23
24

1 and failed to disclose it. Accordingly, the witness testimony cannot be
2 admitted due to an alleged failure on the part of the Agency to respond to a
discovery request.

3 "This testimony is not admitted into evidence but will remain in the record
4 as an offer of proof.

5 "Additionally, the Agency's motion for the forum to take judicial notice of the final
6 order of the OLCC (Ex. A25) is DENIED. Ex. A25 is a Stipulated Settlement
7 Agreement for Entry into Final Order. The agreement, as well as any 'statements
8 made in compromise negotiations' are inadmissible under OEC 408. *See also In*
9 *the Matter of Ruston, Christopher and Christine Stahler*, 34 BOLI 56, 66 (2015)."

10 (Ex. X169)

11 65) The ALJ issued an interim order on February 2, 2017, inviting the parties to
12 submit briefing on the issue of damages. The Agency filed its brief on February 10, 2017,
13 and Respondents filed their briefing on December 21, 2017. (Exs. X171, X172, X173)

14 66) On January 5, 2017, the Agency filed a request for hearing transcript and
15 Respondents sent an email also requesting a copy of the transcript. With the ALJ's
16 interim order of February 2, 2017, the parties were provided with copies of draft transcripts
17 of the testimony of AP1 and AP2 to be reviewed for the purpose of determining which
18 portions should be subject to the interim protective orders in this matter. The parties were
19 encouraged to confer and notify the ALJ if they were able to reach a stipulation. After the
20 parties informed the ALJ that they could not reach an agreement regarding the testimony,
21 a telephone conference was scheduled for February 27, 2017, to discuss the matter. After
22 the parties discussed their general positions regarding the treatment of the transcripts, a
23 briefing schedule was set forth in an interim order issued on March 1, 2017 so that the
24 parties could explain their respective positions in writing.

17 In response to the forum's interim order of March 1, 2017, the parties submitted
18 briefs outlining their respective positions as to which portions of the draft transcripts of the
19 testimony of AP1 and AP2 should be redacted to remove information subject to the interim
20 protective orders. On March 15, 2017, the ALJ issued an interim order specifying the
21 particular portions of the transcript that should be redacted to remove "[i]nformation of a
22 personal nature such as but not limited to that kept in a personal, medical or similar file"
23 pursuant to ORS 192.502(2). (Exs. X170, X171, X176, X177, X179, X180)

21 67) During the February 27, 2017, telephone conference, the Agency and
22 Respondents requested 45 days to file exceptions to the Proposed Order to allow time to
23 review the transcript of the hearing. The ALJ granted the oral request to deviate from the
24 forum's typical 10-day exceptions period, and indicated that the Exceptions Notice in the
Proposed Order would reflect the revised time period. (Post-Hearing Record)

1 68) The ALJ issued an interim order on February 22, 2017, requesting that the
2 Agency file a brief addressing the issue of adequate notice in the Amended Formal
3 Charges no later than March 1, 2017. Respondents were permitted to file responsive
4 briefing no later than March 8, 2017. The Agency filed its brief on March 1, 2017, and
5 Respondents filed their brief on March 8, 2017. On March 15, 2017, the ALJ issued an
6 interim order which stated as follows:

7 **"INTRODUCTION**

8 "The parties submitted briefing on the issue of the adequacy of notice in the
9 Amended Formal Charges with respect to particular sections of OAR 839-005-
10 0030 in response to the forum's interim order issued February 22, 2017.

11 "The Agency argued that all sections of OAR 839-005-0030 – including the
12 proxy liability theory set forth in OAR 839-005-0030(3) – were relevant at the time
13 the charges were issued. The Agency asserted that the allegations in the
14 Amended Formal Charges are sufficient, but moved 'for leave to issue Second
15 Amended Formal Charges to further clarify that each subsection applies and
16 specifically allege that Steven Toth and Respondents' other managers acted as a
17 proxy for Respondent Frehoo, Inc., during times material.' (Agency's Post-Hearing
18 Brief, p. 4)

19 "Respondents asserted that they 'did and reasonably could have
20 understood that the Agency was proceeding based only on sections (5)
21 ('Harassment by Supervisor, No Tangible Employment Action') and (7)
22 ('Harassment by Non-Employees') of OAR 839-005-0030, and not on the basis of
23 proxy liability.' (Resp's Post-Hearing Brief, p. 11) (emphasis in original).
24 Respondents further argue that they would be substantially prejudiced if the
Agency could add the theory of proxy liability to the Amended Formal Charges.
Additionally, Respondents asserted that if the Agency is permitted to amend, then
Respondents should be granted leave to amend their Answer and the record
should be reopened to allow Respondents to offer evidence to defend against
proxy liability allegations.

18 **"RULING**

19 "The Agency mentioned the proxy liability theory for the first time during
20 closing arguments. OAR 839-050-0140(4) does not apply because the Agency
21 did not move to amend the Amended Formal Charges before the close of the
22 evidentiary portion of the hearing. Under OAR 839-050-0140(5), the ALJ may
23 allow pleadings to be amended to conform to evidence when (1) the Agency has
24 shown good cause for not including the new matter in its charging document and
(2) Respondents are not able to show substantial prejudice from the amendment.
The ALJ may grant a continuance to allow the objecting party to produce additional
evidence.

1 "As set forth in the rule, if the forum found there was good cause and
2 permitted the Agency to add the proxy liability theory, the record would need to be
3 reopened to allow Respondents to present additional evidence to respond to the
4 new allegation. Because the evidentiary record in this case closed on December
5 7, 2016, the forum declines to permit the Agency to amend and add the proxy
6 liability allegations.

7 "As indicated above, Respondents expected to defend against charges of
8 harassment by supervisor, no tangible employment action, under OAR 839-005-
9 0030(5) and harassment by non-employees under OAR 839-005-0030(7). The
10 Amended Formal Charges and the Amended Answer also included allegations and
11 defenses related to the definition and standard for determining sexual harassment
12 as set forth in OAR 839-005-0030 (1) and (2). The Amended Formal Charges did
13 not mention the theories set forth in OAR 839-005-0030(3) (employer proxy), OAR
14 839-005-0030(4) (harassment by supervisor plus tangible employment action),
15 OAR 839-005-0030(8) (withdrawn consent), OAR 839-005-0030(9)
16 (opportunities/benefits granted).

17 "Accordingly, the forum GRANTS the Agency's request to amend the
18 Amended Formal Charges to specifically cite to OAR 839-005-0030(1), (2), (5) and
19 (7). The request to add additional sections of OAR 839-005-0030 to the Amended
20 Formal Charges is DENIED."

21 (Exs. X174, X175, X178, X181)

22 69) On May 1, 2017, the Agency submitted a Notification of Settlement of
23 Charges as to AP1 and Joint Request for Transcript. The ALJ issued an interim order on
24 May 10, 2017, which stated:

"Notification of Settlement"

25 "On May 1, 2017, the Agency filed a document notifying the forum that the
26 parties reached an agreement in settlement of the charges concerning Aggrieved
27 Person #1 and that a fully executed settlement document would be submitted to
28 the forum within the coming weeks. **The parties are hereby ordered to submit
29 a fully executed settlement agreement or, alternatively, a status report with
30 an estimate as to when an agreement will likely be filed no later than May 19,
31 2017.**

32 "After the settlement is finalized according to the procedures set forth in
33 OAR 839-050-0220, a Proposed Order will be issued which contains the facts
34 necessary to make proposed findings regarding the charges concerning Aggrieved
35 Person #2.

1 **Request for Transcript**

2 “The parties also jointly requested a copy of the hearing transcript “as soon
3 as practicable and prior to the issuance of the Proposed Order.” Under normal
4 circumstances, the forum does not receive a transcript of the hearing until after a
Final Order is issued and a Notice of Appeal is filed. See OAR 839-050-0350(3).
However, this case involves several unique circumstances, which are as follows:

- 5 • The hearing lasted for 15 days, including closing arguments.
6 • A court reporter was present throughout the entirety of the hearing to
transcribe the testimony, arguments and objections made by the parties,
7 and statements of the ALJ.
8 • Over 40 witnesses testified and there were significant factual disputes.
9 • The ALJ had access to a draft transcript when preparing the Proposed
Order.

9 Given the totality of these circumstances, the ALJ exercises discretion pursuant to
10 OAR 839-050-0240 and finds that distribution of the transcript to the parties will
likely result in a more efficient process for reviewing the Proposed Order and
11 drafting any potential Exceptions that may be filed.

12 “The final, certified transcript will be provided to the ALJ by the court reporter
within the next few days. The ALJ will then instruct the Contested Case
Coordinator to make hard copies of the transcript and provide them to the parties
13 at the same time and on the same day, subject to the following conditions:

- 14 • The parties may use the transcript solely for the purpose of reviewing the
15 Proposed Order and filing Exceptions (or, thereafter, for appellate
purposes).
16 • The parties may not scan or make electronic copies of the transcript.
17 • The parties may only make and distribute hard copies of the transcript to
attorneys and staff who are involved in reviewing the Proposed Order and
18 filing Exceptions (or, thereafter, for appellate purposes).
The parties are bound by all interim protective orders that have been issued
in this matter.

19 **IT IS SO ORDERED”**

20 (Exs. X182, X183)

21 70) On May 12, 2017, Respondents filed a request for clarification regarding the
22 use of the transcript, and the Agency responded on May 15, 2017. After reviewing the
issues and concerns raised by the parties, the ALJ issued an interim order on May 17,
23 2017, which stated, in pertinent part:
24

1 "After reviewing the issues and concerns raised by the parties, the interim order of
2 May 10, 2017, is hereby supplemented as follows:

- 3 • Electronic copies of the transcript may be made for the purposes described
4 in the interim order of May 10, 2017. However, any electronic copies must
5 be secured with a password or some other means of restricting access only
6 to those individuals permitted to review the transcript under the terms of the
7 May 10, 2017, interim order.
- 8 • The forum will release copies of the transcript to the Agency, Respondents'
9 counsel and counsel for AP2. The Contested Case Coordinator will contact
10 the parties when the transcript is available to be picked up from BOLI's
11 Portland office. The forum will not be providing a copy of the transcript to
12 counsel for AP1, because the parties notified the forum that an agreement
13 was reached to resolve the claims involving AP1.
- 14 • No one is permitted to copy or use the transcript for purposes other than for
15 the reasons set forth in the May 10, 2017, interim order.⁵¹
- 16 • The restrictions set forth above and in the interim order of May 10, 2017,
17 shall remain in place until a Notice of Appeal is filed with the Oregon Court
18 of Appeals (unless this ruling is modified by a subsequent interim order or
19 by the Deputy Commissioner in the Final Order).

20 **"Record Clarification as to Volume 9**

21 "The index at the beginning of Volume 9 indicates that page 1873 was
22 removed and saved in a sealed envelope. However, that particular page is not
23 subject to the interim protective orders and was not removed and placed in a
24 sealed envelope.

IT IS SO ORDERED"

(Exs. X184 - X186)

71) Telephone conferences with the parties were held on May 19, 2017, and
May 26, 2017, to discuss the status of the settlement documents regarding AP1. After
requests were received for a Final Order of Informal Disposition ("FOID") as to the claims
involving AP1, the ALJ issued a FOID on June 15, 2017, disposing of the claims related
to AP1. (Exs. X187 - X189, X191, X192)

⁵¹ This forum only has jurisdiction over the matters alleged in the Amended Formal Charges. Any additional
concerns regarding access to the transcript for purposes of fairness in the civil proceeding are not properly
directed to the forum and could be raised with the court.

1 72) On June 14, 2017, Respondents filed motion to remove the restrictions on
2 the use of the hearing transcript. The Agency filed a response to Respondents' motion
on June 16, 2017. Respondents' motion is DENIED. (Exs. X190, X193)

3
4 73) The ALJ issued a proposed order on July 18, 2017, that notified the
participants they were entitled to file exceptions to the proposed order within 45 days of
5 its issuance. The Agency and Respondents timely filed exceptions on September 1,
2017. The exceptions are addressed following the Opinion section of the Final Order.

Appendix B

