



BUREAU of LABOR & INDUSTRIES

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

In the Matter of:

GARDEN RESORT, LLC,

Respondent.

Case No. **67-20**

FINDINGS OF FACT
CONCLUSIONS OF LAW
OPINION
ORDER

SYNOPSIS

The forum concluded that Respondent unlawfully discriminated and retaliated against Complainant in violation of ORS 653.641(2) and OAR 839-007-0065(1)(b),(c),(e) and (3) when it required him to present a doctor's note showing that he was fit to return to work and sent him home after he took sick time. Complainant was awarded \$12,000 in emotional distress damages for that violation. The forum dismissed charges that Respondent discriminated and retaliated against Complaint in violation of ORS 659A.030(1)(b), OAR 839-005-0010(1)(a)(b)(c)(d)(A), (B)(i)(I); OAR 839-005-0010(4)(a)(A)(B)(C), (b); ORS 659A.030(1)(f); OAR 839-005-0125(1)-(3) and OAR 839-005-0010(1)(a)(b)(c)(d)(A).

The above-entitled case came on regularly for hearing before Kari Furnanz, designated as Administrative Law Judge ("ALJ") by the Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 15-17, 2021, via the GoToMeeting video conference application.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by

Administrative Prosecutor Rachel Diamond-Cuneo, an employee of the Agency. Complainant, Raul Santana ("R Santana") was present throughout the hearing. Respondent Garden Resort, LLC ("Garden Resort") was represented throughout the proceeding by Attorney Terrence Kay ("Kay").

The Agency called R Santana, Civil Rights Investigator Imn Coury ("Coury"), Luis Santana ("L Santana"), Laurie Rennick ("Rennick"), Suzy Lindgren ("Lindgren") and Lindsay Allen ("Allen") as its witnesses.

Mary Akins ("Akins"), Cherie Barajas ("Barajas"), Peggy Bell ("Bell"), R Santana, Terry Sours ("Sours") and Sara Wolke ("Wolke") testified for Garden Resort.

The forum received into evidence: (a) Administrative exhibits X1 through X63; (b) Agency's exhibits A1-A11;¹ and (c) Garden Resort exhibits R2 (pages 3 and 4 only), R9, R17, R30 (pages 8 and 9 only), R38 and R39.

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

FINDINGS OF FACT – PROCEDURAL

1) R Santana filed a complaint with the Agency's Civil Rights Division on November 26, 2018, citing ORS 659A.030(1)(a)-(b), (f), and ORS 653.641. In the

¹ Garden Resort objected to Exhibits A6-A8 (investigator notes from witness interviews of Rennick, William McMahon and Lindgren) due to hearsay, irrelevance and because the witnesses were available to give live testimony. The ALJ noted that hearsay is admissible in BOLI administrative hearings when it is reliable. See OAR 839-050-0260(1). The documents were initially received into the record for the sole purpose of showing that the interviews were conducted, but not for the substantive content of the documents. The ALJ further stated that the entirety of the exhibits could be admissible later in the hearing if additional information was provided from witnesses to show the reliability and relevance of the statements in the interviews.

² The Ultimate Findings of Fact required by OAR 839-050-0370(1)(b)(B) are subsumed within the Findings of Fact – The Merits.

1 complaint, he alleged that Garden Resort engaged in unlawful employment practices and
2 discriminated against him based on his race, national origin, for reporting discrimination
3 and the invocation of sick leave under Oregon law. (Ex. A1)

4 2) On November 26, 2019, the Agency's Civil Rights Division issued a Notice
5 of Substantial Evidence Determination ("SED") for Case No. EEMRC181126-41816 in
6 which it found substantial evidence of unlawful employment practices (terms and
7 conditions) in violation of ORS 659A.030 and (interference with sick leave) in violation of
8 ORS 653.641. (Ex. A11)

9 3) On February 18, 2020, the forum issued a Notice of Hearing to Garden
10 Resort and the Agency, stating the time and place of the hearing as November 6, 2018,
11 beginning at 9:30 a.m., at BOLI's Salem office, located at 3865 Wolverine Street NE,
12 Building E-1, Salem, Oregon. Together with the Notice of Hearing, the forum sent a copy
13 of the Agency's Formal Charges, a document entitled "Summary of Contested Case

14 Rights and Procedures" containing the information required by ORS 183.413, a document
15 entitled "Servicemembers Civil Relief Act (SCRA) Notification," a multi-language notice
16 explaining the significance of the Notice of Hearing, and a copy of the forum's contested
17 case hearings rules, OAR 839-050-0000 to 839-050-0445. (Exs. X2, X2a, X2b)

18 4) The Formal Charges alleged that Garden Resort (1) subjected R Santana
19 "to different terms and conditions" and a hostile working environment because of his race
20 in violation of ORS 659A.030(1)(b), OAR 839-005-0010(1)(a)(b)(c)(d)(A), (B)(i)(I) and
21 OAR 839-005-0010(4)(a)(A)(B)(C), (b); (2) discriminated against R Santana because he
22 opposed an unlawful practice, in violation of 659A.030(1)(f), OAR 839-005-0125(1)-(3)
23 and OAR 839-005-0010(1)(a)(b)(c)(d)(A); and (3) interfered with sick time to which an
24

1 employee is entitled to under ORS 653.601 to 653.661 in violation of ORS 653.641(1)
2 and OAR 839-007-0065(3). (Ex. X2b)

3 5) After obtaining an extension of time from the forum, on March 4, 2021,
4 Garden Resort timely filed an answer to the Formal Charges in which it denied the
5 allegations. (Exs. X3- X4, X6-X-7, X9)

6 6) After the Agency and Garden Resort's counsel indicated by email that they
7 consented to accept filings by email, the ALJ issued interim orders stating that parties
8 could file documents by email and containing instructions for the temporary filing
9 procedures. (Ex. X7 – X8)

10 7) On April 29, 2020, the Agency filed a Notice of Reassignment indicating that
11 the case had been reassigned to Chief Prosecutor Cristin Casey. (Ex. X10)

12 8) On May 27, 2020, the ALJ issued an interim order requiring case summaries
13 to be filed no later than June 30, 2020, and set out the requirements for what each
14 participant must include in their case summary. The interim order also set dates for filing
15 formal discovery motions and dispositive motions. (Ex. X11)

16 9) On June 3, 2020, the Agency filed an unopposed motion for a prehearing
17 conference to discuss setting a new hearing date for this matter. The prehearing
18 conference was held on June 16, 2020. During the prehearing conference, the parties
19 indicated their preference for an in-person hearing. The ALJ rescheduled the hearing to
20 begin on November 17, 2020, and successive days thereafter until concluded, and set a
21 new filing date for case summaries of November 3, 2020. (Exs. X12-X14)

22 10) On October 16, 2020, ALJ Cynthia Domas issued an interim order stating:

23 "This matter was originally set for hearing on July 14, 2020. On June 3, 2020, the
24 Agency filed an unopposed motion to postpone the hearing due to the COVID-19

1 pandemic. After a prehearing conference in which both parties stated a preference
2 for an in-person hearing, the hearing was rescheduled to November 17, 2020.

3 "Although I originally stated that a prehearing conference would be held to discuss
4 holding the hearing via video on November 17, 2020, Respondent has requested,
5 via email, a postponement due to the on-going pandemic. The Agency, in
6 responding to Respondent's email, did not object to Respondent's request.
7 Respondent does not need to file a formal postponement motion.

8 "Having further considered the number of postponements in this case, the fact that
9 state office buildings are closed through the end of 2020, and the improbability of
10 securing an alternate hearing location, I am cancelling the hearing in this matter
11 scheduled for November 17, 2020.

12 "I am rescheduling the hearing for **March 2, 2021**, and successive days thereafter.
13 If current restrictions due to the pandemic are still in place at that time, the hearing
14 will be held via video.

15 **Case Summaries Due Date: February 16, 2021**
16 **Dispositive Motions Due Date: January 19, 2021**
17 **Discovery Motions Due Date: January 12, 2021**

18 **IT IS SO ORDERED."**

19 (Ex. A15)

20 11) On December 3, 2020, ALJ Cynthia Domas issued an interim order
21 reassigning the case to ALJ Kari Furnanz. The interim order specified that the hearing
22 date and case deadlines remained the same, subject to any interim orders subsequently
23 issued by ALJ Furnanz. (Ex. X16)

24 12) On January 21, 2021, the forum issued an interim order stating that, "due
to ongoing COVID-19 requirements for gatherings and social distancing," the hearing
would be conducted by video conference on the currently scheduled hearing date of
March 2, 2021, beginning at 9:30 a.m. Further instructions regarding participation in a
video conference hearing were attached to this interim order, along with a link for
connecting to the hearing via the GoToMeeting application. (Ex. A17)

1 13) On January 28, 2021, Garden Resort filed a motion titled "Unopposed
2 Respondent's Counsel Motion for Brief Setover due to COVID Limitations and Travel
3 Restrictions." In the motion, Respondent requested a postponement of the hearing date
4 of March 2, 2021, because Respondent's counsel has been at his home in Arizona since
5 the onset of COVID, he is 67 years old and is not traveling due to health care limitations
6 and travel restrictions. He further argued that he needed to be in his office in Salem,
7 Oregon, to prepare for the matter.

8 On January 28, 2021, the Agency filed a response to Respondent's motion, stating
9 that the Agency did not join Respondent's motion and that the Agency did not agree that
10 the motion should be filed as unopposed. Rather, the Agency told Respondent's counsel
11 "that it would take no position on Respondent's motion."

12 In response to email questions from ALJ Furnanz, Respondent filed a supplement
13 to its motion on February 1, 2021.

14 The ALJ issued an interim order on February 5, 2021, which stated, in pertinent
15 part:

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

- 18 (A) Whether previous postponements have been granted;
19 (B) The timeliness of the request;
20 (C) Whether a participant has previously indicated it was prepared to
21 proceed;
22 (D) Whether there is a reasonable alternative to postponement; for
23 example, submitting a sworn statement of a witness; and
24 (E) The date the hearing was originally scheduled to commence.

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

23 "The forum applies the above-referenced factors to this case as follows:
24

1 (A) The hearing in this matter was previously postponed twice. The first
2 postponement was in response to a motion from the Agency; the second
3 postponement was due to an email request from Respondent. Both parties
4 agreed to each of the previous requests for postponement.

5 (B) The current postponement request was made approximately five weeks
6 prior to the scheduled hearing date. The motion was filed over three months
7 after ALJ Domas informed the parties that the hearing may take place by
8 video and one week after ALJ Furnanz officially notified the parties that the
9 hearing would take place by video conference.

10 (C) ALJ Domas issued an interim order on October 16, 2020, notifying the
11 parties that the hearing could take place by video conference if pandemic
12 restrictions continued. Prior to filing its current postponement motion,
13 Respondent did not notify the forum of any difficulties in appearing for a
14 virtual hearing.

15 (D) Holding the hearing by video conference is a reasonable alternative to
16 postponement.

17 (E) The hearing was originally scheduled for July 14, 2020. Respondent's
18 request that the hearing be postponed for 90 days after March 2, 2021, is
19 eleven months after the original hearing date and approximately three years
20 after the events at issue in this matter.

21 The following ruling takes these considerations into account.

22 "Respondent's primary reason for seeking a postponement is because
23 Respondent's attorney lives in Arizona, but indicates that he would need to travel
24 to his law office in Salem, Oregon for the hearing. Importantly, Respondent's
counsel did not previously bring this information to the forum's attention.
Furthermore, in response to the ALJ's email questions, he did not explain what
steps, if any, were taken to prepare for a video hearing on March 2, 2021, after
being notified of that possibility on October 16, 2020. In its motion, Respondent
asserted that matters in circuit courts are 'routinely reset' due to the pandemic.
However, while some court proceedings may have been rescheduled, the forum
notes that Oregon Supreme Court Chief Justice Martha Walters informed
members of the Oregon State Bar on December 18, 2020, that courts were
providing the full range of services, as long as they could do so by remote means.³

³ See <https://www.osbar.org/docs/resources/CJLettertoOSB12-18-20.pdf> (noting that Oregon courts held "almost 5,000 video proceedings" from April to November 2020). On December 14, 2020, Chief Justice Walters also reported to the Chair of the Oregon Senate Committee on Judiciary that Oregon courts "have held more than 5,000 hearings in civil cases since April, including evidentiary [hearings]" remotely and, during that same time period, Oregon courts held "136 bench trials in civil cases" remotely. See <https://olis.oregonlegislature.gov/liz/201911/Downloads/CommitteeMeetingDocument/227411>.

1 "Importantly, an analysis of 'good cause' involves a showing of 'an
2 excusable mistake or a circumstance over which the participant had no control.'
3 OAR 839-050-0020(16). In this situation, more than four months in advance of the
4 hearing date of March 2, 2021, the parties were given notice by ALJ Domas that
5 the hearing could take place by video if current pandemic restrictions remained in
6 place. The forum finds that this notice provided the parties with sufficient time to
7 take reasonable steps to be prepared to proceed on the scheduled date.
8 Therefore, Respondent is not in a situation over which it 'had no control' as is
9 required to demonstrate 'good cause' for a postponement. Accordingly,
10 Respondent's motion is DENIED, and the video hearing will proceed as scheduled
11 on March 2, 2021."

12 (Exs. X18 – X22)

13 14) On February 16, 2021, Garden Resort filed a motion for an extension until
14 February 19, 2021, for the parties to file their case summaries due to a local snow and
15 ice storm, which caused power and internet outages. The forum issued an interim order
16 granting the motion by email on February 16, 2021. (Ex. X23-X24)

17 15) Both the Agency and Garden Resort timely filed their case summaries on
18 February 19, 2021. (Exs. X25-X26)

19 16) Garden Resort filed an Amended Case Summary on February 22, 2021,
20 and an addendum to its case summary on February 25, 2021. (Exs. X27, X29)

21 17) The ALJ issued an interim order on February 25, 2021, appointing Jessica
22 Dover and Philip Guttman, Oregon Certified Court Interpreters pursuant to ORS 45.291,
23 to serve as Spanish language interpreters at the hearing. (Ex. X30)

24 18) On February 25, 2021, the Agency filed Amended Formal Charges which
removed a charge of "interference with sick time" in violation of ORS 653.641(1) and
replaced it with a charge alleging that Garden Resort "retaliated or discriminated against
Complainant" for requesting, taking or invoking the use of sick time in violation of ORS

1 653.641(2).⁴ (Ex. X28)

2 19) On the same day that Amended Formal Charges were filed, Garden Resort
3 filed a motion for postponement, arguing that Garden Resort needed additional time to
4 prepare to defend against the new charge, conduct discovery regarding the new charge
5 and file motions against the new charge. In its response to the motion, filed on February
6 26, 2021, the Agency objected, asserting that it amended the Formal Charges "to correct
7 a statutory citation error and is based on the facts already alleged in the Formal Charges."
8 Garden Resort filed a reply brief later the same day. Garden Resort also filed a demand
9 for cross examination of declarant on February 25, 2021, and the Agency responded to
10 that motion on February 26, 2021. (Exs. X32-X34)

11 20) The ALJ issued an interim order on February 26, 2021, ruling on the motions
12 filed the previous day. The interim order first notified the parties that OAR 839-050-0150
13 provides for motions and a corresponding responsive filing by the nonmoving participant.

14 Since replies to responses are not contemplated under BOLI's contested case hearing
15 rules, Garden Resort's reply brief would not be considered when ruling on the motion.
16 The interim order further stated, in pertinent part:

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

- 19 (A) Whether previous postponements have been granted;
20 (B) The timeliness of the request;
21 (C) Whether a participant has previously indicated it was prepared to
proceed;
22 (D) Whether there is a reasonable alternative to postponement; for
example, submitting a sworn statement of a witness; and

23 ⁴ The heading for the section with this allegation in the Amended Formal Charges remained the same,
24 indicating that it is a claim for interference with sick time under ORS 653.641(1), but the substantive
allegations were changed to a charge for retaliation or discrimination under ORS 653.641(2).

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 twice. The first
5 postponement was in response to a motion from the Agency; the second
6 postponement was due to an email request from Respondent. Both parties
7 agreed to the first two requests for postponement. The forum denied the
8 third postponement motion, which was filed by Respondent.

7 (B) The current postponement request was made on the same day of the
8 filing of the Amended Formal Charges, which were submitted five days prior
9 to the start of the hearing.

9 (C) Prior to the filing of the Amended Formal Charges, the parties filed case
10 summaries and exhibits and were prepared to proceed to hearing.

10 (D) The Agency did not propose any other alternatives to address
11 Respondent's concerns. The forum notes that one alternative would be to
12 conduct the hearing in two phases, with the first phase based on the
13 unchanged allegations in Section IV and V of the Amended Formal Charges
14 and a second phase addressing the charges under Section VI regarding
15 ORS 653.641(2). However, that would not be an efficient use of time by the
16 forum and the parties, particularly in a case in which Spanish language
17 interpreters are needed for the entire hearing.

15 (E) The hearing was first set for hearing on July 14, 2020.

16 The following ruling takes these considerations into account.

17 "An analysis of 'good cause' to postpone a hearing date involves a showing
18 of "an excusable mistake or a circumstance over which the participant had no
19 control." OAR 839-050-0020(16). There is nothing in the record to indicate that
20 Respondent caused the Agency to amend its Formal Charges less than a week
21 prior to the hearing, and the Agency offers no explanation as to why the
22 amendment was made at this time. Nevertheless, the forum's rules permit
23 amendments prior to the hearing. See OAR 839-050-0150.

21 "However, the timing of the Agency's amendment in this case would result
22 in the hearing beginning prior to the passing of the seven-day deadline provided
23 to [Garden Resort] to file a response to the Amended Formal Charges. *Id.* In a
24 case in which a respondent does not object or there are minor clerical corrections
to a charging document, that might not present concerns. The Agency's assertion
that it is simply correcting a 'citation error' is not persuasive in that the charge is

1 alleging a new theory (discrimination or retaliation) in place of the prior allegation
2 of interference. To ensure that 'reasonable notice' is provided to [Garden Resort]
3 under ORS 183.415, the forum concludes that some additional time should be
4 provided to [Garden Resort] to address the revised charge and the forum will allow
5 a short postponement of the case. Accordingly, the motion to postpone is
6 GRANTED. The parties must notify the ALJ by email no later than noon on
7 Monday, March 1, 2021, of dates they are available to proceed to a virtual
8 hearing between March 23 – April 1, 2021.

9 "[Garden Resort's] motion also discusses conducting additional discovery
10 and filing dispositive motions. Both of those deadlines have passed and the forum
11 is not persuaded that they should be extended, with one small exception: [Garden
12 Resort] may conduct brief discovery on the limited issue of facts related to the new
13 charge raised under ORS 653.641(2). No further discovery or motion practice will
14 be permitted."

15 (Ex. X36) (emphasis in original)

16 21) On March 1, 2021, the Agency filed Second Amended Formal Charges to
17 amend the heading of the sick time violation allegation to state: "RETALIATION OR
18 DISCRIMINATION FOR REQUESTING, TAKING OR INVOKING SICK TIME IN
19 VIOLATION OF ORS 653.641(2)." Garden Resort filed an answer to the Second
20 Amended Formal Charges on March 4, 2021. (Exs. X37, X40)

21 22) The Agency filed an addendum to its case summary on March 1, 2021. (Ex.
22 X38)

23 23) Following the forum's interim order of February 26, 2021, postponing the
24 hearing, the parties notified the ALJ that they were available for hearing beginning
Tuesday, March 23, 2021. On March 3, 2021, the ALJ issued an interim order
rescheduling the hearing to take place March 23-24, 2021, and asked the parties for
additional days they were available for hearing, if they felt that the hearing would last
longer than two days. Garden Resort submitted a letter stating that it was available for
hearing on March 29, 2021. The Agency did not submit a response. Accordingly, the

1 ALJ issued an interim order on March 9, 2021, stating that the third day of hearing would
2 be March 29, 2021. (Exs. X39, X41)

3 24) On March 4, 2021, Garden Resort filed a document titled "RESPONDENT'S
4 MOTIONS TO: (1) AFFIRM RIGHTS TO DISCOVERY AND MOTION PRACTICE AS TO
5 NEW CLAIM, WHICH WAS DENIED WITHOUT HEARING AND DUE PROCESS; (2)
6 POSTPONE CONTESTED CASE HEARING TO ALLOW SUFFICIENT TIME TO
7 COMPLETE DISCOVERY AND MOTION PRACTICE; AND (3) REQUEST LEAVE TO
8 FILE A REPLY BRIEF."

9 The ALJ issued an email Notice to the Parties on March 9, 2021, which stated:

10 "The interim order issued on February 26, 2021, recognized that the motion filing
11 deadline had expired and informed the parties that no further motions would be
12 considered. Accordingly, prior to the hearing, the ALJ will not be issuing a ruling
13 on issues raised in the document titled: *Respondent's Motions to (1) Affirm Rights
to Discovery and Motion Practice; (2) Postpone Contested Case Hearing; and (3)
Request Leave To File A Reply Brief*, which was filed on Thursday March 4, 2021.
The issues raised in this filing and any response filed by the Agency will be
addressed in the Proposed Order."

14 The Agency responded to Garden Resort's motions on March 11, 2021. (Exs. X42
15 - X43, X44 at Ex. M)

16 25) On March 15, 2021, Garden Resort filed a motion to stay this proceeding,
17 pending a ruling on the Petition for Stay, Review and Reversal of Agency Orders against
18 BOLI, the ALJ and the Administrative Prosecutor that Garden Resort filed in Marion
19 County Circuit Court that day. The Agency filed a response to the motion on March 17,
20 2021. (Exs. X44, X46)

21 26) On March 19, 2021, the ALJ issued an interim order postponing the hearing
22 for 90 days, and requesting that the parties email the ALJ with their availability for new
23 hearing dates. Additionally, the case schedule was modified to allow Garden Resort to
24

1 file dispositive motions on or before April 2, 2021, and the Agency to respond to those
2 motions by April 16, 2021. The ALJ's interim order of March 23, 2021, set a new hearing
3 date of June 15-17, 2021, and informed the parties that the hearing would be held via
4 GoToMeeting using the same link sent to the parties in the interim order of January 21,
5 2021. (Ex. X47, X48)

6 27) On March 17, 2021, Garden Resort filed a document titled "Respondent's
7 Motion For Recusal Of Administrative Law Judge Kari Furnanz as Due Process Requires
8 Based on Conflict Of Interest, Bias, and Pecuniary Interest." In the motion, Garden Resort
9 asserted that "the assigned ALJ cannot proceed over this matter because the ALJ has
10 been named as a defendant/respondent in the case filed by Respondent in the Oregon
11 Circuit Court for Marion County," in which Garden Resort asserted that its due process
12 rights were violated because BOLI lacked jurisdiction to proceed with the allegations of a
13 violation of ORS 653.641(2) asserted in the Amended and Second Amended Formal
14 Charges.

15 In an interim order issued March 23, 2021, the forum ruled on the motion, stating,
16 in pertinent part:

17 "To establish a due process violation in this context, [Garden Resort] 'must
18 demonstrate actual bias on the part of the decision-maker.' *Janel Shicor, SLP v.*
19 *Board of Speech Language Pathology and Audiology*, 291 Or App 369, 374, 420
20 P3d 638 (2018). '[T]he substantive standard for actual bias is that the decision
21 maker has so prejudged the particular matter as to be incapable of determining its
22 merits on the basis of the evidence and arguments presented.' *Columbia*
23 *Riverkeeper v. Clatsop County*, 267 Or App 578, 602, 341 P.3d 790 (2014)
24 (quoting *Beck v. City of Tillamook*, 113 Or App 660, 662-63, 833 P2d 1327 (1992)).
There is no evidence in the record of an 'actual bias' against [Garden Resort], and

1 the Marion County case is in the process of being dismissed. Accordingly,
2 Respondent's motion is DENIED."⁵

3 (Exs. X45, X48)

4 28) Garden Resort filed a Second Addendum to its Case Summary on April 2,
5 2021. (Ex. X49)

6 29) On April 20, 2021, Garden Resort filed a motion titled "Respondent's Motion
7 for Written Disclosure on the Record of All Ex Parte Communications Between BOLI/DOJ
8 and Administrative Law Judge Kari Furnanz as Required by Law." The forum issued an
9 interim order ruling on the motion on April 21, 2021, which stated, in pertinent part:

10 "OAR 839-050-0310(1) defines an 'ex parte communication' as 'an oral or
11 written communication to an agency decision maker or the presiding officer not
12 made in the presence of all parties to the hearing, concerning a fact in issue in the
13 proceeding, but does not include communication from agency staff or counsel
14 about facts in the record.' When an ex parte communication occurs, the ALJ is
15 required to 'place on the record a statement of the substance of any ex parte
16 communication on a fact in issue made to the Administrative Law Judge while the
17 proceeding is pending.' OAR 839-050-0310(2). The ALJ did not receive any ex
18 parte communications so there are none to be placed on the record. Accordingly,
19 [Garden Resort's] motion is DENIED as moot."

20 (Exs. X57-X58)

21 30) On April 20, 2021, Garden Resort filed motions (1) to Strike Agency's
22 Responses to Respondent's Motions to Dismiss and Motion for Summary Judgment; (2)
23 for Leave to File Replies to Agency's Responses to Respondent's Motions to Dismiss and
24 Motion for Summary Judgment; and (3) for Oral Argument on Respondent's Motions to
Dismiss and Motion for Summary Judgment filed on April 20, 2021. After obtaining an
extension of time, the Agency filed a timely response to the motions on May 4, 2021. The

⁵ The forum takes judicial notice that the petition filed by Garden Resort in Marion County circuit court was dismissed. OAR 839-050-0320; OEC 201, 202(2).

1 forum issued an interim order ruling on the motions on June 15, 2021, which stated, in
2 pertinent part:

3 "[Garden Resort] first moves to strike the Agency's responses to [Garden
4 Resort's] Motions to Dismiss and Motion for Summary Judgment 'because they
5 improperly present legal argument through BOLI Administrative Prosecutor Rachel
6 Diamond-Cuneo, who is not an active attorney, who is explicitly prohibited by OAR
839-050-0230 from presenting legal argument.' The forum notes that Assistant
Attorney General Johanna M. Riemenschneider also signed the Agency's
responses. Accordingly, the provisions of OAR 839-050-0230 were not violated.

7 "In [Garden Resort's] second and third motions, it requests leave to file a
8 reply to the Agency's motion responses and present oral argument because 'an
9 Agency representative has attempted to mislead the Forum into taking action
10 against [Garden Resort] by making a false or misleading representation, which
11 raises serious concerns as to due process and the reasonableness and fairness
12 of this proceeding.' The forum will be basing its rulings on the pending motions on
the evidence presented. In the event a statement in the briefing differs from the
content of the exhibit, the actual evidence will take precedence. The parties have
already extensively briefed the issues and additional briefing or oral argument will
not be helpful to the forum's analysis.

13 "Accordingly, [Garden Resort's] motions are DENIED."

14 (Exs. X54-X56, X59- X60, X61)

15 31) On April 2, 2021, Garden Resort filed motions to dismiss the charge that
16 Respondent violated ORS 659A.641(2). The Agency filed a timely response to the
17 motions on April 15, 2021. The forum issued an interim order ruling on the motion on
18 June 15, 2021, which stated, in pertinent part:

19 **"1st Motion: Lack of Jurisdiction: No Determination of Substantial Evidence**

20 "[Garden Resort] first asserts that the forum lacks jurisdiction over the
21 alleged violations of ORS 653.641(2) because there was no finding of substantial
22 evidence as to that ORS 653.541(2). Notably, the Agency issued a Notice of
23 Substantial Evidence Determination ('SED') finding substantial evidence of a
24 violation of 653.541(1) on November 26, 2019. Formal Charges were issued on
February 14, 2020, which included an alleged violation of 653.541(1), but not
653.541(2). On February 25, 2021, the Agency filed Amended Formal Charges
which removed a charge of interference with sick time in violation of ORS
653.641(1) and replaced it with a charge alleging that [Garden Resort] 'retaliated

1 or discriminated against Complainant' for requesting, taking or invoking the use of
2 sick time in violation of ORS 653.641(2). The Formal Charges were then amended
3 a second time on March 1, 2021, to change a heading to include a reference to
4 ORS 653.641(2).

5 "The Commissioner's authority to proceed with issuing formal charges is
6 derived from ORS 659A.845(1) which states that the Commissioner may prepare
7 formal charges if a finding of substantial evidence has been issued. If a finding of
8 substantial evidence is not issued one year after a complaint is filed, the
9 Commissioner's authority 'ceases.' ORS 659A.830(3). In this case, a SED was
10 issued in regards to the Complainant's complaint filed with BOLI's Civil Rights
11 Division, but the SED did not cite to the particular subsection of ORS 653.641 that
12 is now at issue in the Second Amended Formal Charges. However, unlike ORS
13 183.415(3)(c) which requires a reference to a particular subsection of a statute in
14 the charging document, ORS 659A.845(1) and the applicable administrative
15 regulations do not require a citation to the subsection.

16 "Accordingly, [Garden Resort's] Motion to Dismiss No. 1 is DENIED.

17 **"2nd Motion: Lack of Jurisdiction: Statute of Limitations**

18 "[Garden Resort] also argues that the alleged violation of ORS 653.641(2)
19 should be dismissed because it was first asserted in the Amended Formal Charges
20 issued on February 25, 2021, approximately two and one half years after
21 Complainant resigned from employment. [Garden Resort] argues that ORS
22 659A.820(2) renders the allegations untimely because Complainant did not file a
23 written complaint within one year of the alleged unlawful practice. However,
24 Complainant did file a written complaint on November 26, 2018. There is no
requirement that a Complainant's written complaint cite to the particular subsection
of the statute at issue. As well, given that OAR 839-050-0140(1) allows for the
amendments of formal charges before the evidence closes at hearing, there does
not appear to be a requirement that the Complainant file a new civil rights complaint
in order for the Agency to proceed with citing to a new subsection of a statute in
its charging document.

"Accordingly, [Garden Resort's] Motion to Dismiss No. 2 is also DENIED.

"3rd Motion to Dismiss: Laches

"[Garden Resort] next argues that the allegation under ORS 653.641(2)
should be dismissed pursuant to the doctrine of laches because the Agency's
'delay of over two and a half (2.5) years in adding the new claim has resulted in
prejudice to [Garden Resort] to the extent that it would be inequitable to afford the
relief sought in the claim.'

1 "In response, the Agency argues that the defense of laches is not one of the
2 enumerated grounds for filing a motion to dismiss in a BOLI proceeding. Those
3 grounds are listed in OAR 839-050-0150(1). However, regardless of whether or
4 not it is an appropriate to raise the issue with a motion to dismiss, 'the defense of
5 laches is not available against the government, state or national, in a suit by it to
6 enforce a public right or protect a public interest.' See *Corvallis Sand & Gravel v.*
7 *State Land Board*, 250 Or 319, 328-29, 439 P2d 575 (1968). See also *City of*
Mosier v. Hood River Sand, Gravel & Ready-Mix, Inc., 206 Or App 292, 320, 136
P3d 1160 (2006) (the defense of laches was not available when a city brought a
suit to enforce its zoning ordinance, which was an attempt to enforce a public right
and to protect the interests of its citizens). Similarly, the defense of laches is not
available in this proceeding in which the Agency is attempting to enforce the
statutes and regulations within its jurisdiction.

8 "Therefore, [Garden Resort's] Motion to Dismiss No. 3 is DENIED.

9 **"4th Motion to Dismiss: Failure to State a Claim/Alternative Motion to Make**
10 **More Definite and Certain**

11 "[Garden Resort] also moved to dismiss the alleged violation of ORS
12 653.641(2) for failure to state a claim or, alternatively, to make the allegation more
13 definite and certain. OAR 839-050-0060(1)(b) states that a charging document
14 must contain a 'short concise statement of the matters that constitute the alleged
violation.' Reading Sections IV.5.⁶ and VI.2. together, the forum finds that the
Second Amended Formal Charges meet this standard by alleging that Respondent
retaliated against Complainant by requiring a note before Complainant returned to
work after protected leave. Accordingly, the motion to dismiss is DENIED.

15 "To obtain more factual details or specificity about the allegations, if needed,
16 Respondent had the opportunity to issue discovery requests and, in particular,
17 interrogatories to ask further questions. Therefore, the motion to make more
definite and certain is also DENIED."

18 (Exs. X50, X53, 62)

19 32) On April 2, 2021, the Respondent filed a motion for summary judgment to
20 dismiss the charge that Respondent violated ORS 659A.641(2). The Agency filed a
21

22
23 _____
24 ⁶ Two sections of the Second Amended Formal Charges are labeled with "IV." This reference is to the first
of the "IV." sections.

1 timely response to the motions on April 15, 2021. The forum issued an interim order
2 ruling on the motion on June 15, 2021, which stated, in pertinent part:

3 "A motion for summary judgment may be granted where no genuine issue
4 as to any material fact exists and a participant is entitled to a judgment as a matter
5 of law, as to all or any part of the proceedings. OAR 839-050-0150(4)(B). The
6 standard for determining if a genuine issue of material fact exists and the
7 evidentiary burden on the participants is as follows:

8 ' * * * No genuine issue as to a material fact exists if, based upon the
9 record before the court viewed in a manner most favorable to the adverse
10 party, no objectively reasonable juror could return a verdict for the adverse
11 party on the matter that is the subject of the motion for summary judgment.
12 The adverse party has the burden of producing evidence on any issue
13 raised in the motion as to which the adverse party would have the burden
14 of persuasion at [hearing].'

15 ORCP 47C. In reviewing a motion for summary judgment, this forum draws all
16 inferences of fact from the record against the participant filing the motion for
17 summary judgment and in favor of the participant opposing the motion. *In the*
18 *Matter of Derrick's Custom Painting, Inc.*, 37 BOLI 271, 275 (2020). In considering
19 summary judgment motions, this forum gives some evidentiary weight to unsworn
20 assertions contained in the participants' pleadings and other filings. *In the Matter*
21 *of F.R. Custom Builders, Inc.*, 20 BOLI 102, 104 (2000).

22 "The record considered by the forum in deciding this motion consists of the
23 Agency's Second Amended Formal Charges, Respondent's Answer to the Second
24 Amended Formal Charges, Respondent's motion and accompanying exhibits and
the Agency's response to the motion and accompanying exhibits.

"The first three motions for summary judgment pertain to legal issues
(jurisdiction and laches) that were resolved in the ruling on Respondent's Motion
to Dismiss. Accordingly, those motions are also DENIED.

"The fourth motion requests dismissal of the allegation of a violation of ORS
653.641(2) on the basis that there is no genuine issue of material fact. The Agency
alleges that Respondent retaliated against Complainant by requesting a doctor's
note before he returned to work after taking protected leave. In its Answer to the
Second Amended Formal Charges, Respondent provides an alternative reason for
requesting the note ('to ensure compliance with food and safety guidelines'). This
contradicts the Agency's theory of the case and, accordingly, this factual issue will
need to be resolved at hearing. Drawing all inferences against the participant filing
the motion (Respondent) and in favor of the Agency, the forum finds that
Respondent's motion did not demonstrate that there was no issue of material fact.
Accordingly, Respondent's motion is DENIED.

1
2 **"IT IS SO ORDERED."**

3 (Exs. X51-X52, X63)

4 33) At the beginning of the hearing, the ALJ provided R Santana with the
5 opportunity to talk with the Spanish language interpreter briefly so that the interpreter and
6 R Santana could make sure they could communicate with one another. After they spoke,
7 R Santana informed the ALJ that he told the interpreter that he "like[s] to speak English"
8 and that he wanted to listen to the proceedings in English, but have the interpreter
9 available if he had "any questions about any terminology or legal terminology" that he did
10 not understand. The ALJ instructed R Santana to notify the ALJ when he needed to
11 speak to the interpreter, and that he would need to turn on his computer microphone when
12 doing so. R Santana confirmed that he would notify the ALJ if he needed assistance from
13 the interpreter. The Administrative Prosecutor and Garden Resort's counsel did not
14 object to the hearing being conducted in this manner. (Hearing Record)

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

18 35) When the hearing began, the ALJ made note on the record of the individuals
19 who had joined video conference call, and asked the parties to identify any other
20 individuals who were present. During the cross examination of Coury, Garden Resort's
21 counsel stated that he noticed that an unidentified woman appeared to be in the room
22 with R Santana. The Administrative Prosecutor identified the woman as Allen, an
23 individual who was listed as a witness for the Agency, and observed that Allen was leaving
24 so that she would no longer be in the same room as R Santana. The ALJ noted that it

1 was not appropriate for Allen to observe the proceeding before she testified, and
2 instructed the Agency and Garden Resort's counsel to notify the ALJ if a witness joined
3 the video hearing.⁷ (Hearing Record)

4 36) On December 8, 2023, the ALJ issued a Proposed Order that notified the
5 participants that they were entitled to file exceptions of the Proposed Order within 10 days
6 of its issuance. The Agency filed exceptions on December 15, 2023, and Garden Resort
7 filed exceptions on December 18, 2023.

8 FINDINGS OF FACT – THE MERITS

9 *Garden Resort Background Information*

10 1) At all times material herein, Garden Resort was an active limited liability
11 company doing business in Silverton, Oregon. (Exs. X37, X40)

12 2) Moonstone Hotel Properties ("Moonstone") owns Garden Resort, and
13 provides human resource services to Garden Resort. Moonstone implemented
14 employment policies that Garden Resort follows. (Testimony of Bell, Barajas)

15 3) Garden Resort includes a hotel, conference/banquet facilities and a full
16 restaurant. (Ex. A5, p. 2)

17 4) Bell was the General Manager of Garden Resort. She was hired in January
18 of 2014 as the Assistant General Manager, and was promoted to the General Manager
19 position in the fall of 2017. (Testimony of Bell)

20 5) Barajas was hired by Moonstone in July of 2017. She was responsible for
21 handling all HR matters for Moonstone's hotel properties, which included Garden Resort.

22
23 ⁷ Witnesses are typically excluded from BOLI hearings until after their testimony has concluded, unless the
24 witness is also a party to the proceeding such as a complainant, an official representative of the Agency or
a respondent. See, e.g., *In the Matter of Northwestern Title Loans LLC*, 30 BOLI 1, 8 (2008).

1 (Testimony of Barajas)

2 *Employment of R Santana at Garden Resort*

3 6) R Santana is Mexican. He first worked for Garden Resort in 2009, and left
4 to work elsewhere. (Testimony of R Santana)

5 7) On August 10, 2015, Garden Resort rehired R Santana to work as a line
6 cook at the rate of \$12 per hour. Garden Resort increased his hourly pay rate to \$13
7 effective October 5, 2015. He received a promotion to the position of Kitchen Supervisor
8 on August 18, 2016. On or about November 3, 2016, Supervisor MaryBeth Papaneri
9 ("Papaneri") prepared a performance evaluation for R Santana, rating his performance as
10 "1" (superior) in all categories. On that same date, Papaneri signed a Personnel Action
11 Form changing R Santana's position from "Supervisor" to "Manager" and increasing his
12 hourly rate of pay to \$18.27 per hour. (Testimony of R Santana; Ex. A10, pp. 8-16, 19-
13 21)

14 *Taylor's Supervision of R Santana*

15 8) For a period of time, R Santana was supervised by Joan Taylor ("Taylor").
16 (Testimony of R Santana; Ex. R2, pp. 3-4)

17 9) R Santana and Hugo Martinez (a former Garden Resort employee) used
18 the kitchen space for a personal event on September 7, 2017. Bell and Taylor spoke with
19 R Santana and told him that it was "unacceptable" to use the kitchen in this manner "due
20 to the liability and theft of resources." Afterwards, R Santana sent Taylor the following
21 text messages:

22 "What you do today it was unnecessary you could just talk to me about it.

23 * * *

1 "Well now Hugo doesn't have kitchen for his wedding ... thank you!!!

2 ***

3 "You don't know us yet we are good workers, we all ways [sic] when we ask, went
4 [sic] the need us we hardly take time off I go we everyone's shifts all the time. [sic]

5 "No, you kick us out we don't even for time for that [sic]."

6 (Testimony of R Santana; Ex. R2, pp. 3-4)

7 10) On September 8, 2017, Garden Resort presented a Disciplinary Action form
8 to R Santana regarding the incidents on September 7, 2017, which stated, in part:

9 *** [R Santana] was very defensive and kept trying to change the subject to
10 issues that he's having with [Taylor]. After explaining to him that was a separate
11 issue that will be discussed later, he accepted that he had violated company
12 policies and apologized.

13 "A few minutes later, [R Santana] began sending text messages to [Taylor] blaming
14 her for Hugo no longer having a kitchen for his wedding.

15 ***

16 "Furthermore, as Kitchen Supervisor, [R Santana] reports directly to Joan Taylor.
17 As her subordinate, [R Santana] is expected to obey directions/instructions [Taylor]
18 gives him related to the kitchen. [R Santana] is to respect the authority associated
19 with [Taylor's] position and is to treat her with respect at all times. All Moonstone
20 Employees are expected to treat their supervisors, other managers and all other
21 staff with courtesy and respect. It is against company policy [to] engage in
22 disrespectful behavior of a fellow employee.

23 "Moving forward, *** [R Santana] is also to treat [Taylor] with respect and refrain
24 from sending inappropriate, aggressive text messages questioning decisions she
has made. ***"

In the section titled "Action to be Taken," the box marked "Verbal Warning" was checked.

(Ex. R2, pp. 3-4)

21 11) R Santana thought that this discipline was unfair because he "got
22 permission from the previous supervisor." (Testimony of R Santana)

1 *Wolke's Supervision of R Santana*

2 12) Garden Resort hired Wolke on November 27, 2017, to serve as the
3 Assistant General Manager. In this position, she oversaw the operations of the
4 restaurant, lounge, and banquet services. As part of her duties, Wolke supervised R
5 Santana. When she began, Wolke understood that she was hired to implement more
6 structure in terms of scheduling, cleanliness, preventative maintenance, and the coaching
7 of employees. (Testimony of Wolke)

8 13) In the restaurant industry, "a changing of the guards can be very stressful."
9 (Testimony of Sours; Ex. R9)

10 14) When Wolke arrived, she "set the bar high" and had higher expectations
11 than the prior food and beverage manager. (Testimony of Sours, Akin)

12 15) Akin, a female cook at Garden Resort, sometimes told R Santana that a
13 "dish [he cooked] could use a little of this or a little of that." R Santana did not take Akins's
14 "cook-to-cook" criticism well. (Testimony of Akin)

15 16) Wolke is not trained as a chef. She believed that R Santana had "an
16 amazing palate" and was one of the better creative chefs that she has worked with. On
17 February 21, 2018, Wolke signed a Personnel Action Form increasing R Santana's rate
18 of pay to \$19 per hour. (Testimony of Wolke; Ex. A10, p. 18)

19 17) The menu at Garden Resort changed seasonally, and Wolke was excited
20 to see what new dishes R Santana introduced. She asked him if there could be a tasting
21 when the new menu was updated, and he seemed excited to do so. The tasting was to
22 be presented to the Director of Operations after an all-team meeting. When it was time
23 to do the tasting, R Santana refused to do it. Wolke told him that she was highly
24

1 disappointed because the team had been "pumped up" to come in and try the new menu.
2 Wolke did not discipline him for this incident and instead felt it was her job to coach R
3 Santana about her expectations. (Testimony of Wolke)

4 18) Wolke instructed R Santana to provide work schedules to employees two
5 weeks in advance, and to arrange for sufficient staff on "critical nights" when the
6 restaurant was busy. Additionally, she asked that R Santana schedule himself to be on
7 hand as a leader to his employees, especially when new staff members were working. R
8 Santana told her that he had earned the right to work the days he wanted. (Testimony of
9 Wolke)

10 19) R Santana was upset with Wolke's requests about scheduling. (Testimony
11 of R Santana, Wolke)

12 20) Wolke had a coaching conversation with R Santana after she received a
13 report that some of R Santana's staff were upset and felt that he treated Hispanic staff
14 members more favorably than Caucasian staff members. (Testimony of Wolke)

15 21) Garden Resort General Manager Bell was present for most of the coaching
16 conversations Wolke had with R Santana. Bell observed that while R Santana was a
17 talented and creative chef, he struggled as a manager when it came to mentoring his
18 staff, ordering, invoicing and taking direction from female managers. (Testimony of
19 Wolke, Bell)

20 22) R Santana felt that Wolke "always approached [him] with an aggressive and
21 yelling mode regarding anything." He also thought that Wolke disrespected him, accused
22 him "of things that never happened," "talked down" to him and made "false statements
23 against my person constantly." (Testimony of R Santana)

1 23) R Santana raised his voice to Wolke many times during their discussions.
2 (Testimony of Wolke)

3 24) At one point, Wolke overheard R Santana refer to her as a "pendeja[],"
4 which she understood to be a vulgar, derogatory insult in Spanish that meant "feeble-
5 minded female, a coward, a dumb female, an idiot."⁸ (Testimony of Wolke)

6 25) R Santana made reports to General Manager Bell that Wolke treated
7 Caucasian employees differently than Mexican employees. He spoke to Bell "several
8 times at her office," "two times a month, three times a month, for five months probably."
9 Wolke was present "a few times" when he made the reports. He told the "corporate" office
10 in January of 2018 that "Wolke treats badly only the Hispanic workers" and the company
11 "did not investigate and denied all wrongdoing."⁹ (Testimony of R Santana)

12 26) Wolke sent an email to HR Generalist Barajas on April 10, 2018, stating:

13 "I am once again having a small issue with one of my supervisors[, R Santana].
14 ~~He is not performing to standards. He has been having a hard time writing a~~
15 schedule that is manageable. He has not been on time to do inventory for the past
16 few weeks. He is not monitoring webtime to help keep his people out of [overtime]
17 and watching the time punches. More than that however is the Email messages
18 that I receive from him that are Rude. He is consistently replying to the e mails
19 that I send very disrespectfully. I have had 2 sit downs [sic] with him where [Bell]
20 was involved. (over the last month or 2). I have been very careful with how I coach
21 him as he gets very angry and spouts off with topics that don't [sic] make sense
22 sometimes.

23 "I am going to sit down with him again today and go over his job description so that
24 he can clearly see that he is not meeting standards and we can go from there. I
just wanted you to be aware."

⁸ The Spanish word "pendeja[]" can be used to refer to someone as an "asshole," "dumb-ass" or "idiot."
(Testimony of R Santana)

⁹ There was no testimony to directly refute R Santana's contentions that he made these reports, although
Bell testified that she was not aware that Wolke treated R Santana differently than other managers.
(Testimony of Bell) Barajas was asked if she received a report from R Santana in January of 2018 and she
responded that she could not remember dates specifically. (Testimony of Barajas)

1 In response, Barajas told Wolke that she needed "to document your sit down with him as
2 a written warning." On April 12, 2018, Wolke emailed Barajas, stating "[R Santana] took
3 it well" and that "he was not shocked that we need to talk about his area. I think that
4 moving forward we will see a different side of him." (Ex. A5, p. 10)

5 *R Santana's Use of Sick Leave in June 2018*

6 27) Garden Resort has a policy requiring employees who are out ill for more
7 than three days to present a doctor's note to return to work. Garden Resort does "this to
8 ensure" that its "employees are returning to work safely and [that it is] not unknowingly
9 letting them return to full duty at work before the doctor feels it's appropriate." (Testimony
10 of Bell, Wolke; Exs. A5, p. 3, A10, p. 22)

11 28) R Santana took three days of sick leave from Wednesday, June 6, 2018,
12 to Friday, June 8, 2018. He was also sick and did not work on Tuesday, June 5, 2018,
13 his regular day off. (Testimony of R Santana)

14 29) On Wednesday, June 6, 2018, R Santana's doctor wrote a note stating that
15 R Santana should be absent from work for two days due to a respiratory infection.
16 (Testimony of R Santana; Ex. A5, p. 3)

17 30) Wolke called R Santana on June 9, 2018, and left him a voicemail.
18 (Testimony of R Santana)

19 31) When R Santana returned to work on June 9, 2018, Wolke asked him to
20 present a doctor's note releasing him back to work. (Testimony of Wolke; Ex. A5, p. 15)

21 32) Garden Resort "knew [R Santana] was quite ill" and requested the note from
22 his doctor to verify that he was able to return to work. (Ex. A5, p. 3)

23 33) Wolke's conversation with R Santana and her request for the doctor's note
24

1 made R Santana upset, and they had a heated discussion. Wolke told R Santana to leave
2 the workplace and go home. (Testimony of R Santana, Wolke)

3 34) On Sunday, June 10, 2018, R Santana sent an email¹⁰ stating that he was
4 resigning. (Testimony of R Santana, Barajas)

5 35) On Monday, June 11, 2018, R Santana sent an email to HR Generalist
6 Barajas, asking to speak with her over the telephone. Barajas responded on June 13,
7 2018, stating that she was back to work after being sick and asked him to give her a call
8 that afternoon. After R Santana and Barajas spoke, R Santana told Barajas that he was
9 "working" on providing information to her, but he did not follow up with Barajas to discuss
10 issues he told her he wanted to raise regarding his resignation. (Testimony of Barajas;
11 Ex. A5, pp. 17-18)

12 36) After the events of June 9, 2018, R Santana felt "anxiety" and "had
13 depression." His life partner, Allen, observed a "drastic" change in R Santana's behavior
14 in June of 2018 in that he appeared to be under "extreme stress," and was anxious and
15 depressed. (Testimony of R Santana, Allen)

16 37) On December 1, 2018, R Santana opened his own restaurant, Magnolia
17 Grill, in Mt. Angel, Oregon, and moved the location to Silverton, Oregon, in April of 2021.
18 (Testimony of Santana)

19 *Credibility Findings*

20 38) The forum found the following witnesses to be credible: Coury, Barajas,
21 Akin, Wolke and Bell. Although Barajas, Akin, Wolke and Bell were employed by Garden
22

23 _____
24 ¹⁰ The resignation email was not offered into evidence by either of the parties.

1 Resort and testified in support of their employer, they provided straightforward testimony
2 regarding matters of which they had personal knowledge and frankly admitted when they
3 could not recall sufficient information to answer questions. Additionally, their testimony
4 was generally consistent with other credible evidence in the record as explained in more
5 detail below.

6 HR Generalist Barajas worked at Moonstone's location in California. Barajas
7 provided HR services to multiple Moonstone-owned hotels and was not onsite working at
8 Garden Resort, which made it less likely that she would have a substantial bias in favor
9 of any of the other witnesses in this case. Barajas was forthcoming and admitted when
10 she could not recall dates. Her testimony that R Santana did not follow up with her to
11 discuss issues raised in his resignation email was consistent with evidence placed in the
12 record by the Agency. (See, e.g., Ex. A5, pp. 17-19)

13 Akin was Garden Resort's food and beverage event manager. She cooked for
14 events and scheduled staff. She testified briefly about how the workplace changed at
15 Garden Resort after Wolke came on board as manager and how Wolke set higher
16 expectations than the previous manager. Akin's testimony that R Santana did not
17 respond well to her cooking feedback was consistent with the testimony of Bell and Wolke
18 describing that R Santana did not take direction well from his managers. This testimony
19 was also consistent with the verbal warning R Santana received regarding his
20 disrespectful conduct towards a prior manager, Taylor. Akin also bolstered the testimony
21 of Wolke on the topic of R Santana giving preferential treatment to his Hispanic family
22 members. When asked about whether there was preferential treatment, Akin responded
23 "With the scheduling, yes. Not in all aspects, no." This answer demonstrated that she
24

1 was attempting to be careful and accurate in her testimony, rather than simply agreeing
2 to what Garden Resort's counsel asked. She also provided detail when asked whether
3 R Santana gave preferential treatment when distributing kitchen leftovers, responding,
4 "Kind of. They got first pick of the leftovers, you know, things like that, extra food that we
5 would initially throw away or reuse for other things. But, yeah."

6 Bell's demeanor did not change between direct and cross examination. She made
7 statements that were helpful and complimentary to R Santana. For example, she
8 described R Santana as a "very talented, very creative chef," and said that she wanted
9 him to stay and continue working at Garden Resort. Additionally, when discussing
10 Garden Resort's policy to require a note when returning to work from sick leave, she
11 openly admitted the policy existed and testified consistently with R Santana's description
12 of how Wolke applied the policy to him. Additionally, prior to the events in this case, Bell
13 issued a verbal warning to R Santana on September 8, 2017, for his insubordination

14 towards his previous female supervisor for unauthorized use of the kitchen space with a
15 staff member. (Ex. R2, pp. 3-4) Bell's testimony about R Santana's struggles with his
16 staff and problems with his supervisors was consistent with the verbal warning Bell issued
17 to R Santana several years prior to her testimony.

18 39) R Santana's behavior during the hearing called into question his credibility.
19 For example, he had to be instructed several times to answer the questions he was asked
20 by both the Administrative Prosecutor and Garden Resort's counsel. He often gave non-
21 responsive answers and attempted to tell his own story, rather than listen and respond to
22 questions. At times, he was argumentative and responded with phrases such as "we're
23 a free country." R Santana also tended to make sweeping generalizations of Wolke's
24

1 treatment of him, rather than provide examples of the alleged adverse actions taken
2 against him.

3 One key part of the credibility analysis in this case is for the forum to determine
4 what occurred between Wolke and R Santana during the time Wolke supervised him. In
5 particular, the forum must decide whether to believe R Santana's testimony that Wolke
6 was overly critical of him because he is Hispanic, or Wolke's testimony that R Santana
7 was resistant to Wolke's authority and to the changes she was trying to make. Both R
8 Santana and Wolke had an inherent motive to portray their own actions more favorably.
9 Thus, the forum must look to other credible evidence in the record which may support
10 their version of events. As described above, before Wolke started supervising R Santana,
11 he was disciplined with a verbal warning for disrespectful behavior towards his previous
12 manager, Taylor. The evidence of R Santana's verbal warning for his insubordination to
13 Taylor, as well as the evidence from witnesses about his inability to take criticism, lend

14 credence to Wolke's version of events. Additionally, as explained in the previous
15 paragraph, R Santana's own conduct at hearing was consistent with this evidence.
16 Therefore, when the testimony of R Santana and Wolke conflicted, the forum credited
17 Wolke's testimony over R Santana's version.

18 40) The testimony of Sours concerning what he observed and his experience in
19 the restaurant industry was credible. However, the forum did not give credit to his
20 personal opinion as to whether R Santana was "discriminating" against Wolke because
21 she was a woman in a position of authority. (Testimony of Sours)

22 41) At the time of her testimony, Rennick was employed as an assistant
23 manager by Magnolia Grill, the restaurant owned by R Santana. Rennick previously
24

1 worked as a manager for Garden Resort until she was terminated for engaging in a
2 physical altercation and using profanity towards another employee.¹¹ Rennick appeared
3 to have a bias against Garden Resort and in favor of R Santana in that she testified with
4 certainty that R Santana was "fired" from Garden Resort, and admitted on cross
5 examination that she was not aware that he submitted a resignation letter.¹² Rennick also
6 testified that she observed Hispanic workers being treated differently from other workers
7 at the resort. However, Rennick could not recall the names of any of the workers except
8 for one Hispanic employee named "Maria." Rennick testified that she issued discipline to
9 Maria, at the direction of Wolke, but Rennick did not agree that Maria should be
10 disciplined. However, Rennick could not recall any of the details regarding why Maria
11 was disciplined and could not recall anything about her conversation with Wolke about
12 the discipline of Maria. Due to the vagueness of the testimony, Rennick's inability to recall
13 the details regarding the discipline of Maria, Rennick's inaccurate testimony about the

14 end of R Santana's employment and her likely bias against Garden Resort due to her
15 termination, the forum is unable to credit Rennick's testimony. (Testimony of Rennick)

16 42) Lindgren had an inherent bias in favor of R Santana as she was his friend
17 and performed catering consulting work for his business, Magnolia Grill. Additionally,
18 although Lindgren discussed how R Santana was treated in the workplace, she admitted
19 that most of her testimony was based on information she heard from Rennick and R
20 Santana. Lindgren did not have firsthand knowledge of the incidents she described. As
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22

23 ¹¹ See Testimony of Wolke. Wolke's testimony on this issue was uncontroverted.

24 ¹² On cross examination, Garden Resort's counsel asked Rennick "do you know if [R Santana] was fired or
are you just guessing?" and Rennick responded, "I believe he was fired."

1 well, portions of Lindgren's testimony conflicted with the statements she provided to
2 BOLI's investigator. During direct examination, Lindgren testified confidently and with
3 certainty that she witnessed Wolke have a "hostile attitude" towards R Sanatana "on
4 numerous occasions," yet treated other managers "very gracious and kind."

5 However, on cross examination, she had to "clarify" and made admissions that
6 detracted from her direct testimony. For example, Garden Resort's counsel asked
7 Lindgren about statements she made to BOLI's investigator in which she admitted that
8 she worked a different shift from R Santana. In response, she admitted that she worked
9 the lunch shift and stated, "if I may clarify that. I did – [R Santana] worked the dinner shift
10 – oh. Sorry." This hesitation and clarification called into doubt Lindgren's ability to
11 observe the interactions between R Santana and Wolke that she had confidently testified
12 about during direct examination.

13 Other portions of the testimony she provided on cross examination called into
14 question the testimony she provided during direct examination, such as:

15 "Q. So I just asked you, your statement to the investigator for this matter
16 just over two years ago was, quote, I never witnessed any, good or bad, with [R
Santana] and [Wolke], quote/unquote.

17 "That's true then and that's true now, isn't it?

18 "A. Well, other than I just stated, because I know I am under oath, and I did
19 see those things that I referred to earlier. And I didn't see it often, but I did see the
hostility. And that I just stated earlier.

20 "Q. Yeah, you mentioned hostility, but that's a word you're using to describe
something. That's not a fact of what you actually witnessed, is it?

21 "A. No.

22 ***

23 "Q. I see. Now, you were also asked by the investigator about Ms. Wolke
24 and how she acted and so forth. Do you remember being asked about that?

"A. Vaguely.

"Q. Okay. And do you remember, quote – this is the question. Quote, See
racial aspect to it, question mark? That was question to you. And you said, Not

1 see myself. Do you remember that?

"A. I do.

2 "Q. That's true. Right?

"A. Again, other than what I just previously stated.

3 ** **

4 "Q. (BY MR. KAY) You never saw any racial aspect to what Ms. Wolke did
5 against Mr. Santana, did you? I mean you seeing it personally. You never saw
any, did you?

6 "A. Again, as I had previously stated, I did see -- well, I guess I can't see
hostility.

7 ** **

8 "Q. Okay. Then you were asked this question. So then, is there anything
you can think -- I'll rephrase. I'll restart.

9 "Quote, So then is there anything you can think of in particular that you see
10 as evidence of discrimination or that allowed you to make that conclusion, unquote.
And you said, quote, Just that general sense. I can't think of a specific regarding
11 [Wolke] and [R Santana]. I would give Terry a call and talk to him. He'll be honest,
unquote.

"Do you remember making that statement to the investigator?

12 "A. Yes, I do."

13 Due to the inconsistencies between Lindgren's direct testimony and her

14 admissions on cross examination, the forum concludes that Lindgren's testimony was not
15 credible. (Testimony of Lindgren; Ex. A8)

16 43) L Santana is the second cousin of R Santana and worked at R Santana's
17 new restaurant, Magnolia Grill. L Santana contradicted the testimony of R Santana about
18 L Santana's work performance at Garden Resort. In particular, L Santana's denial that
19 he missed work conflicted with R Santana's testimony that L Santana was not reliable
20 about coming to work and was late a few times. R Santana further admitted that he had
21 said he was "tired" of L Santana's "shit," and that "he's done." L Santana denied that R
22 Santana had problems with his work habits and that R Santana told him he was "done."
23 L Santana's testimony also differed from the testimony of other witnesses, including Sours
24

1 and Akin, regarding problems with L Santana's work performance. Accordingly, the forum
2 concludes that L Santana was not a credible witness. (Testimony of L Santana)

3 44) Allen was a co-worker and friend of R Santana when he worked for Garden
4 Resort. She worked in the spa and the banquet department at the resort. At the time of
5 the hearing, she was R Santana's "life partner" and corporate records identified her as
6 the "manager" of R Santana's restaurant business, Magnolia Grill. Although Allen had a
7 motive to be biased in favor of R Santana, she credibly testified about her observations
8 of him while working at Garden Resort and afterwards. Her detailed testimony concerning
9 R Santana's medical providers demonstrated that she was familiar with Santana's mental
10 health status after he left his employment at Garden Resort and at the time of the hearing.

11 However, while R Santana was employed at Garden Resort, Allen only saw him
12 occasionally as she walked through the kitchen. They worked in different departments
13 and R Santana would begin his shift around the time her shift ended. For those reasons,

14 the forum gave little weight to any observations Allen had of R Santana and his demeanor
15 during the time that he worked for Garden Resort. (Testimony of Allen; Ex. R39)

16 CONCLUSIONS OF LAW

17 1) At all times material herein, Garden Resort was an employer as defined in
18 ORS 659A.001(4)(a) and employed R Santana.

19 2) Garden Resort did not subject R Santana to different terms and conditions
20 of employment based on his race, and did not violate ORS 659A.030(1)(b) and OAR 839-
21 005-0010(1)(a)(b)(c)(d)(A), (B)(i)(I).

22 3) Garden Resort did not subject R Santana to harassment because of his
23 race, and did not violate ORS 659A.030(1)(b) and OAR 839-005-0010(4)(a)(A)(B)(C) (b).

4) Garden Resort discriminated and retaliated against R Santana because he submitted a request for sick time, took sick time or invoked any provision of ORS 653.601 to 653.661 in violation of ORS 653.641(2) and OAR 839-007-0065(2)(b), (c), (e) and (3).

5) The 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 - ORS 659A.865.

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

OPINION

The Second Amended Formal Charges allege that Garden Resort subjected Santana to three violations. First, the Agency alleges that Garden Resort subjected Santana to different terms and conditions of employment and harassed him on the basis of race in violation of ORS 659A.030(1)(b), OAR 839-005-0010(1)(a)(b)(c)(d)(A), (B)(i)(I) and OAR 839-005-0010(4)(a)(A)(B)(C) (b). Second, the Agency asserts that Garden Resort discriminated against R Santana because he opposed an unlawful practice, in violation of 659A.030(1)(f), OAR 839-005-0125(1)-(3) and OAR 839-005-0010(1)(a)(b)(c)(d)(A). Additionally, the Agency asserts that Garden Resort retaliated or discriminated against R Santana because he "submitted a request for sick time, took sick time or invoked any provision of ORS 653.601 to 653.661 in violation of ORS 653.641(2) and OAR 839-007-0065(2)(b), (c), (e) and (3)."

The Agency seeks emotional distress damages for R Santana of at least \$100,000 and an unspecified amount of out-of-pocket expenses.

1 **RACE DISCRIMINATION - DIFFERENT TERMS AND CONDITIONS OF EMPLOYMENT**

2 In Paragraph Second IV of the Second Amended Formal Charges, the Agency
3 alleges that Garden Resort "subjected [R Santana] to different terms and conditions [of
4 employment] because of his race" in violation of ORS 659A.030(1)(b), OAR 839-005-
5 0010(1)(a)(b)(c)(d)(A), (B)(i)(l). It is an unlawful employment practice for "[a]n employer,
6 because of an individual's * * * race * * * to discriminate against the individual in
7 compensation or in terms, conditions or privileges of employment." ORS 659A.030(1)(b).
8 Specifically, the alleged violation focuses on alleged racial harassment, which will be
9 discussed below.

10 **RACE DISCRIMINATION – HARASSMENT**

11 In the Second Amended Formal Charges, the Agency alleges that Wolke, R
12 Santana's supervisor, subjected him to racial harassment. Supervisors with "immediate
13 (or successively higher) authority over the employee" are considered agents of an
14 employer for purposes of an employer's Title VII liability. *Faragher v. City of Boca Raton*,
15 524 US 775, 807 (1998).¹³ Determining whether a particular individual is a supervisor "is
16 not dependent upon job titles or formal structures within the workplace." *Dawson v. Entek*
17 *Int'l.*, 630 F3d 928, 940 (9th Cir 2011), citing *McGinest v. GTE Service Corp.*, 360 F3d
18 1103, 1119 n.13 (9th Cir 2004). Rather, for purposes of vicarious liability under Title VII
19 a person is a supervisor "if he or she is empowered by the employer to take tangible
20 employment actions against the victim." *Vance v. Ball State University*, 570 US 421, 424
21

22 ¹³ Federal law similar to Oregon's civil rights laws is not binding on the forum, but federal decisions can be
23 instructive in construing and applying similar state law. *Bravo Event Services, Inc. and Dan Kor*, 36 BOLI
24 250, 265 (2018). See also *In the Matter of Murrayhill Thriftway, Inc.*, 20 BOLI 130, 149 (2000) (stating that
"decisions interpreting Title VII are instructive in construing and applying the similar state law").

1 (2013). A tangible employment action is "a significant change in employment status, such
2 as hiring, firing, failing to promote, reassignment with significantly different
3 responsibilities, or a decision causing a significant change in benefits." *Burlington*
4 *Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998), OAR 839-005-0010(4)(d). In this
5 case, there is no dispute that Wolke was R Santana's supervisor. Accordingly, if Wolke
6 harassed R Santana because of his race, then Garden Resort would be vicariously liable
7 for her conduct.

8 OAR 839-005-0010(4) defines harassment as follow:

9 "Harassment: Harassment based on an individual's protected class is a type of
10 intentional unlawful discrimination. * * *

11 "(a) Conduct of a verbal or physical nature relating to protected classes
12 other than sex is unlawful when substantial evidence of the elements of
intentional discrimination, as described in section (1) of this rule, is shown
and:

13 (A) Such conduct is sufficiently severe or pervasive to have the
14 purpose or effect of unreasonably interfering with an individual's work
performance or creating an intimidating, hostile or offensive working
environment;

15 (B) Submission to such conduct is made either explicitly or implicitly
16 a term or condition of employment; or

17 (C) Submission to or rejection of such conduct is used as the basis
18 for employment decisions affecting that individual."

19 Based on the above, a prima facie case of racial harassment consists of the following
20 elements: (1) Garden Resort is a respondent as defined by statute; (2) R Santana is a
21 member of a protected class; (3) R Santana was harmed by harassment directed at him;
22 (4) R Santana's race was a reason for the harassment; and (5) the harassment was
23 sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering
24 with the complainant's work performance or creating an intimidating, hostile or offensive

1 working environment.” *In the Matter of Vision International Petroleum, LLC*, 37 BOLI 187,
2 196 (2019). “The standard for determining whether harassment is sufficiently severe or
3 pervasive to create a hostile, intimidating or offensive working environment is whether a
4 reasonable person in the circumstances of the complaining individual would so perceive
5 it.” OAR 839-005-0010(4)(b).

6 Elements 1 and 2 are not in dispute.

7 With respect to Element 3, the Second Amended Formal Charges allege that
8 Wolke treated R Santana “differently than she treated Caucasian workers”¹⁴ in the
9 following ways:¹⁵

- 10 1. “yelling at R Santana”
- 11 2. “falsely accusing [R Santana] of chatting with co-workers when he was discussing
work issues”
- 12 3. “assuming [R Santana] was taking a break”
- 13 4. “falsely accusing [R Santana] of giving preferential treatment to other Hispanic
workers”
- 14 5. “sending negative e-mails to the corporate office about [R Santana], without first
conducting an investigation”

15 In his testimony, R Santana did not provide specific testimony addressing Items 2-5.
16 However, he did testify that Wolke “always approached [him] with an aggressive and
17 yelling mode regarding anything.” He also testified that Wolke disrespected him, accused
18 him “of things that never happened,” “talked down” to him and made “false statements
19 against my person constantly.” In contrast, Wolke credibly testified about the tense
20

21 ¹⁴ The Second Amended Formal Charges also referenced Wolke’s alleged treatment of “other Hispanic
22 employees.” The existence of such evidence could potentially lead to an inference that R Santana was
23 also treated differently due to his race. However, he is not required to prove that other Hispanic employees
were treated differently to support his claim. Accordingly, for purposes of the prima facie case, the forum
will analyze whether the Agency proved the allegations involving R Santana.

24 ¹⁵ This list was not numbered in the Second Amended Formal Charges, but numbers are used in this Final
Order for clarity when discussing the allegations.

1 interactions between the two of them when she discussed concerns with R Santana's
2 performance. She also credibly testified that she received reports from his staff that he
3 treated Hispanic employees he supervised more favorably than Caucasian staff
4 members, and that she spoke to R Santana about those issues.

5 With respect to Element 4, the Agency lacked credible evidence that R Santana
6 was subjected to harassment because of his race. As previously stated, R Santana
7 testified in a general fashion as to the way Wolke treated him, with minimal specific
8 examples. Other witnesses called by the Agency also testified in a conclusory fashion.
9 On cross examination, the witnesses admitted that their direct testimony was not based
10 on personal knowledge of acts of discrimination and, in large part, consisted of
11 information relayed to them by R Santana. (See Findings of Fact – The Merits ##41-44)
12 Additionally, one of the Agency's witnesses had a bias against Garden Resort in that she
13 had been terminated by Wolke and Bell for engaging in a physical fight with another
14 employee. (See Finding of Fact – The Merits #41)

15 In contrast, Wolke testified credibly in detail about the reasons for her interactions
16 with R Santana, including discussions regarding reports she received that he treated
17 some workers more favorably than others,¹⁶ problems with his scheduling and his failure
18 to properly execute the tasting menu event. Because the forum finds Wolke's testimony
19 to be more credible than that of R Santana, the forum concludes that the Agency did not
20 satisfy its burden of proof to show that Wolke treated R Santana differently because of

21
22
23 ¹⁶ The forum makes no conclusion as to whether R Santana actually engaged in this conduct, but notes
24 that it was not unreasonable for Wolke to speak to R Santana about the employees' complaints given that
employers who become aware of harassment or discrimination by a supervisor must take reasonable care
to prevent and promptly correct such behavior. See, e.g., OAR 839-005-0010(4)(d).

1 his race. Therefore, it did not establish a prima facie case of unlawful race discrimination.

2 **DISCRIMINATION FOR OPPOSING UNLAWFUL PRACTICE**

3 The Agency alleges in its Second Amended Formal Charges that Garden Resort
4 violated ORS 659A.030(1)(f) because R Santana opposed Garden Resort's unlawful
5 harassment. The Agency's prima facie case consists of the following elements: (1)
6 Garden Resort was an employer as defined by statute; (2) Garden Resort employed R
7 Santana; (3) R Santana explicitly or implicitly opposed an unlawful practice or what he
8 reasonably believed to be an unlawful practice; (4) Garden Resort subjected R Santana
9 to adverse treatment and (5) there is a causal connection between the protected activity
10 and the adverse treatment. OAR 839-005-0125(2)(a),(b),(c). See also *In the Matter of*
11 *Sis-Q Cellular, LLC*, 38 BOLI 113, 116-17 (2022); *In the Matter of Andrew W. Engel, DMD,*
12 *PC*, 32 BOLI 94, 132 (2012); *In the Matter of From the Wilderness*, 30 BOLI 227, 288
13 (2009).

14 There is no dispute as to Elements 1 and 2.

15 With respect to Element 3 (opposing an unlawful practice), R Santana testified that
16 he made reports to General Manager Bell that Wolke treated Caucasian employees
17 different from Mexican employees. He stated that he spoke to Bell "several times at her
18 office," "two times a month, three times a month, for five months probably." He further
19 stated that Wolke was present "a few times" when he made the reports. He stated in his
20 BOLI interview and in his testimony that he told the "corporate" office in January of 2018
21 that "Wolke treats badly only the Hispanic workers" and the company "did not investigate
22 and denied all wrongdoing." There was no testimony that refuted R Santana's
23 contentions that he made these reports.

1 With regard to Element 4 (adverse treatment), there was evidence that Wolke
2 counseled R Santana about his performance on numerous occasions and had a “sit
3 down” meeting with him to discuss her expectations.

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

15 As well, proof of a causal connection between protected conduct and a materially
16 adverse action can be established “[1] *indirectly*, by showing that the protected activity
17 was followed closely by discriminatory treatment or through other evidence such as
18 disparate treatment of fellow employees who engaged in similar conduct or [2] *directly*,
19 through evidence of retaliatory animus directed against a [complainant] by the
20 [respondent].” *Boynton-Burns v. University of Oregon*, 197 Or App 373, 380, 105 P3d 893
21 (2005) (emphases in original; internal quotation marks omitted).

22 R Santana testified that he made numerous reports of discrimination, but only
23 identified one by date – a January 2018 report made to “corporate.” There is evidence
24

1 that Wolke had a "sit down" meeting with R Santana after the report, in April of 2018.
2 However, the forum found that Wolke credibly testified about the reasons for her
3 discussions with R Santana about improving his performance and, in particular, that she
4 had worked with him to make changes that she had been hired to make at Garden Resort.
5 Moreover, after the April 2018 "sit down" meeting, Wolke made a positive report about R
6 Santana to HR Generalist Barajas, stating that R Santana "took it well" and "that moving
7 forward we will see a different side of him." (See Finding of Fact – The Merits # 26)
8 Additionally, on February 21, 2018, Wolke signed a Personnel Action Form increasing R
9 Santana's rate of pay to \$19 per hour. (See Finding of Fact – The Merits # 16) These
10 actions are favorable to R Santana and suggest a lack of intent to retaliate. Accordingly,
11 the forum is unable to conclude that the preponderance of the evidence¹⁷ shows that
12 Garden Resort subjected R Santana to an adverse action after he made a report of
13 discrimination. Therefore, the Agency did not establish a violation of ORS 659A.030(1)(f).

14 **RETALIATION AND/OR DISCRIMINATION BECAUSE OF USE OF SICK TIME**

15 The Agency alleges Garden Resort "retaliated or discriminated against" R Santana
16 because he "submitted a request for sick time, took sick time, or invoked any provision of
17 ORS 653.601 to 653.661, in violation of ORS 653.641(2) and OAR 839-007-0065(2)(b),
18 c),(e) and (3). More specifically, in its closing argument, the Agency argued that R
19 Santana was harmed when Garden Resort required him to produce a doctor's note
20 releasing him to return to work and when Wolke removed him from the work schedule.
21 The Agency also argued that R Santana "felt forced to resign." ORS 653.641(2) provides
22

23 ¹⁷ "Preponderance of evidence means more probably true than false." *In the Matter of 4R's Associates*
24 *LLC*, 38 BOLI at 77 (internal citations and quotations omitted).

1 that it is an unlawful practice for an employer or any other person to:

2 "Retaliate or in any way discriminate against an employee with respect to
3 any term or condition of employment because the employee has inquired
4 about the provisions of ORS 653.601 to 653.661, submitted a request for
5 sick time, taken sick time, participated in any manner in an investigation,
6 proceeding or hearing related to ORS 653.601 to 653.661, or invoked any
7 provision of ORS 653.601 to 653.661."

8 The pertinent portions of OAR 839-007-0065 state:

9 "2) It is an unlawful employment practice for an employer or any other
10 person to retaliate or in any way discriminate against an employee because
11 the employee has:

12 * * *

13 (b) Submitted a request for sick time;

14 (c) Taken sick time;

15 * * *

16 (e) Invoked any provision of ORS 653.601 to 653.661.

17 ~~"(3) It is an unlawful employment practice for an employer or any other~~
18 ~~person to apply an absence control policy that includes sick time absences~~
19 ~~covered under ORS 653.601 to 653.661 as an absence that may lead to or~~
20 ~~result in an adverse employment action against the employee."~~

21 The Agency's prima facie case under ORS 653.641(2), as applied to the
22 allegations in this case, consists of the following elements: (1) R Santana submitted a
23 request for sick time, took sick time or "[i]nvoked any provision of ORS 653.601 to
24 653.661;" (2) Garden Resort subjected R Santana to an adverse employment action; and
(3) there was a causal connection between R Santana's sick time protected activity
practice and Garden Resort's adverse action against him. *In the Matter of Lioness*
Holdings, LLC, 36 BOLI 227, 241 (2018).

1 With respect to Element 1, there is no dispute that R Santana requested and took
2 sick time in June of 2018.

3 As to Element 2 (adverse employment action), Wolke and Bell admitted that
4 Garden Resort has a policy requiring employees who are out ill for more than three days
5 to present a doctor's note to return to work. Garden Resort does "this to ensure our
6 employees are returning to work safely and we are not unknowingly letting them return to
7 full duty at work before the doctor feels it's appropriate." (See Finding of Fact – The Merits
8 #27) Garden Resort "knew he was quite ill and [it] requested the note from his doctor that
9 simply verified he was able to return to work." (See Finding of Fact – The Merits #32) In
10 addition, Wolke admitted that she asked R Santana for a doctor's note on the day he
11 returned from sick leave to show that he was fit to work.

12 Garden Resort argues that it was permissible under Oregon law to require a note
13 from a doctor when an employee returns to work after sick leave. ORS 653.626(1)(a)
14 provides that if "an employee takes more than three consecutive scheduled workdays of
15 sick time for a purpose described in ORS 653.616 (1) to (4), an employer may require the
16 employee to provide verification from a health care provider *of the need* for the sick time,
17 or certification of the need for leave for purposes of ORS 659A.272 as provided in ORS
18 659A.280." (Emphasis added.) In this case, R Santana returned to work with a note from
19 a medical provider which verified that he was out sick; in other words, showing "the need"
20 for his use of sick time as provided by statute. However, Garden Resort requested that
21 he produce a note showing that he was "fit" and "able" to return to work. That goes
22 beyond the purpose permitted in ORS 653.626(1) and, therefore, the requirement to
23 produce such a note before he could work was an adverse action.

1 Additionally, while R Santana and Wolke described their discussion about the sick
2 leave note differently, they both agreed that the discussion became heated, and that
3 Wolke told R Santana to leave the workplace and go home. Accordingly, the forum
4 concludes that Garden Resort subjected R Santana to adverse actions by (1) requiring
5 him to present a doctor's note declaring he was "fit" before returning to work and (2)
6 sending him home.

7 Finally, as to Element 3 (causation), R Santana's use of sick leave precipitated the
8 adverse actions. If R Santana had not used sick time, Garden Resort would not have
9 required a doctor's note before allowing R Santana to return work and Wolke would not
10 have sent him home. Therefore, Element 3 is also established, and the forum concludes
11 that Garden Resort violated ORS 653.641(2) and OAR 839-007-0065(2)(b), (c), (e) and
12 (3).

13 **DAMAGES**

14 *Out-of-Pocket Expenses*

15 The forum has consistently held that out-of-pocket expenses that are directly
16 attributable to an unlawful practice are recoverable from a respondent as a means to
17 eliminate the effects of any unlawful practice found. *In the Matter of Oregon Truck*
18 *Painting, LLC*, 37 BOLI 87, 114 (2018). There was no testimony or other evidence in the
19 record as to any out-of-pocket expenses R Santana incurred. Accordingly, the forum is
20 unable to award out-of-pocket expenses.

21 *Emotional Distress Damages*

22 The Agency seeks damages on behalf of R Santana in the amount of at least
23 \$100,000 for emotional, mental, and physical suffering. Pursuant to ORS 659A.850, the
24

1 Commissioner of the Bureau of Labor and Industries has the authority to award money
2 damages for emotional, mental, and physical suffering sustained. *In the Matter of Oregon*
3 *Truck Painting, LLC*, 37 BOLI 87, 114-15 (2018). The commissioner has the authority to
4 fashion a remedy adequate to eliminate the effects of unlawful employment practices. *Id.*

5 In determining an award for emotional and physical suffering, the forum considers
6 the type of discriminatory conduct, and the duration, frequency, and severity of the
7 conduct. It also considers the type and duration of the mental distress and the
8 vulnerability of the aggrieved persons. A complainant's testimony, if believed, is sufficient
9 to support a claim for mental suffering damages. *Id.*, citing *In the Matter of Dr. Andrew*
10 *Engel, DMD, PC*, 32 BOLI 94, 141 (2012).

11 After Wolke asked R Santana to produce a doctor's note, and to leave the
12 workplace and go home on June 9, 2018, he felt "anxiety" and "had depression." His life
13 partner, Allen, observed a "drastic" change in R Santana's behavior in June of 2018 in
14 that he appeared to be under "extreme stress," and was anxious and depressed.

15 In this case, the forum is tasked with determining the appropriate amount of
16 emotional distress damages caused by unlawful treatment R Santana experienced as a
17 result of retaliation for taking protected sick leave. Although R Santana resigned from his
18 position at Garden Resort, the Agency did not allege that R Santana was constructively
19 discharged. Thus, the amount of this award is not treated as an award based on an
20 unlawful discharge. The forum looks to past cases in which a complainant faced a
21 negative action for taking protected activity. See *In the Matter of 4Rs Associates, LLC*, 38
22 BOLI 68, 77-78 (2022) (awarding \$10,000 to a complainant who felt devastated and
23 depressed after being fired after he asked his employer for wages owed to him); *In the*
24

1 *Matter of Blue Gryphon, LLC, and Flora Turnbull*, 34 BOLI 216, 239 (2015) (awarding
2 \$20,000 to a complainant who felt "confused," "angry" and "sad" after he was unlawfully
3 discharged for whistleblowing); *In the Matter of Hey Beautiful Enterprises, Ltd.*, 34 BOLI
4 80, 101 (2015) (awarding \$10,000 to a complainant who felt angry and emotionally
5 distraught after being discharged for complaining about unpaid wages). The emotional
6 distress R Santana experienced because of Garden Resort's violation of ORS 653.641(2)
7 supports an award of \$12,000.

8 **OTHER REQUESTED RELIEF**

9 In the Second Amended Formal Charges, the Agency also seeks a cease and
10 desist order against Garden Resort requiring it to stop committing any unlawful
11 employment practices the forum concludes occurred. BOLI's Commissioner is authorized
12 to issue an appropriate cease and desist order reasonably calculated to eliminate the
13 effects of any unlawful practice found. ORS 659A.850(4). Among other things, that may
14 include requiring a respondent to:

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

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

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

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

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

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The Agency submitted 30 Exceptions. After consideration of the Exceptions, the forum grants portions of those Exceptions as reflected above to the extent they were consistent with the record and applicable legal authority, and addressed relevant evidence. The remainder of the Agency's Exceptions are denied. In particular, with respect to the Agency's Exception 14 regarding the ALJ's conclusion that Wolke was a more credible witness than R Santana, the forum declines to overturn the ALJ's credibility finding when the Agency did not articulate a convincing reason to do so. *See In the Matter of Horizontal Motorsports, Inc.*, 37 BOLI 205, 219-20 (2020) "[A]n ALJ's credibility findings are accorded substantial deference and absent convincing reasons for rejecting those findings, they are not disturbed." (quoting *In the Matter of Gordy's Truck Stop, LLC.*, 28 BOLI 200, 216 (2007)). *See also In the Matter of Wallstrom, Kenneth*, 32 BOLI 63, 92-

93 (2012) ("exceptions to the ALJ's credibility findings are denied because those findings are supported by substantial evidence in the record").¹⁸ The argument in support of Exception 14 is based on information which is not in evidence and conflicts with R Santana's statements on the record that he preferred to communicate in English, but wanted to have the interpreter available if he needed assistance. The Agency did not object to the hearing being conducted in this manner.

FINAL ORDER (*Garden Resort, LLC*, # 67-20) - 48

1 *Garden Resort's Exceptions*

2 Garden Resort submitted 24 Exceptions. After considering all of the Exceptions,
3 the Exceptions are granted and denied as outlined below.

4 Exceptions 1, 11-12 and 14-24 relate to the forum's conclusions regarding the
5 violation of ORS 653.641(2) and associated remedies. These are denied for the reasons
6 explained in the Opinion above.

7 Exceptions 2-7 and 13-14 seek reversal of various motion rulings made by the ALJ.
8 These Exceptions are denied for the reasons set forth in the applicable Findings of Fact
9 – Procedural.

10 Exception 8 addresses Finding of Fact – The Merits # 25. It is denied because
11 there was no evidence to refute R Santana's testimony regarding his complaints to
12 "corporate" about Wolke. In support of this Exception, Garden Resort argued that the "ALJ
13 specifically found that the testimony of [R] Santana was not credible" in Finding of Fact –

14 The Merits # 39. However, while the ALJ found issues with that R Santana's credibility
15 and did not credit his testimony when it conflicted with Wolke's testimony, there was no
16 testimony from Wolke or other credible witnesses which contradicted R Santana's
17 testimony about his reports to management. Accordingly, this Exception is denied.

18 Exception 9 is granted as reflected above to indicate that Garden Resort's policy
19 required employees to provide a doctor's note to return to work when they were out sick
20 for "more than three days."

21 Exception 10 disagrees with the portion of Finding of Fact – The Merits # 29, which
22 states that R Santana's doctor wrote a note stating that that he should be absent from
23 work for "two days." The phrase "two days" was used by both R Santana in his testimony
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1 and in Ex. A5, p. 3 (the position statement prepared by Garden Resort and submitted to
2 BOLI's Civil Rights Division during its investigation). Exception 10 cites to Ex. R12, which
3 is not in evidence. Accordingly, Exception 10 is denied.

4 ORDER

5 A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS
6 659A.850(4), and to eliminate the effects of the violations of ORS 653.641(2); OAR 839-
7 007-0065(2)(b),(c),(e) and (3) by Respondent **Garden Resort, LLC**, and as payment of
8 the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby
9 orders Respondent **Garden Resort, LLC** to deliver to the Administrative Prosecution Unit
10 of the Bureau of Labor and Industries, 1800 SW 1st Ave, Suite 500, Portland, Oregon
11 97201-5322, a certified check payable to the Bureau of Labor and Industries in trust for
12 **Raul Santana** in the amount of:

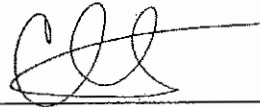
13 1) TWELVE THOUSAND DOLLARS (\$12,000), representing
14 compensatory damages for emotional and physical suffering experienced by Raul
15 Santana as a result of Respondent's unlawful employment practices found herein;
16 plus,

17 2) Interest at the legal rate on TWELVE THOUSAND DOLLARS
18 (\$12,000), until paid.

19 B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS
20 659A.850(4), the Commissioner of the Bureau of Labor and Industries hereby orders
21 Respondent **Garden Resort, LLC** to cease and desist from retaliating or discriminating
22 against employees for submitting a request for sick time, taking sick time, or invoking any
23 provision of ORS 653.601 to 653.661.

24 C. NOW, THEREFORE, the charges the Respondent **Garden Resort, LLC**
violated ORS 659A.030(1)(b), OAR 839-005-0010(1)(a)(b)(c)(d)(A), (B)(i)(I); OAR 839-

1 005-0010(4)(a)(A)(B)(C), (b); ORS 659A.030(1)(f); OAR 839-005-0125(1)-(3) and OAR
2 839-005-0010(1)(a)(b)(c)(d)(A) are **DISMISSED**.

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4 Christina Stephenson, Commissioner
5 Bureau of Labor and Industries

6 ISSUED ON: 2/22/24