



BUREAU of LABOR & INDUSTRIES

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

In the Matter of:

Case No. 03-23

LARIOT CORPORATION,

FINDINGS OF FACT
CONCLUSIONS OF LAW
OPINION
ORDER

Respondent.

SYNOPSIS

In a default case, the Agency proved that Respondent subjected Complainant to unlawful discrimination in violation of the Oregon Family Leave Act ("OFLA") by failing to restore Complainant to the position he held prior to the start of his family leave and by failing to provide Complainant with a written request for information to verify if his leave qualified for OFLA and/or failing to notify Complainant if he was eligible and qualified to take OFLA leave. The Agency also proved that Respondent's separation from employment was a constructive discharge. The Agency did not prove that Respondent committed an unlawful employment practice by denying Complainant family leave. The forum awarded Complainant \$75,152 in lost wages and \$40,000 in emotional, mental, and physical suffering damages. In addition to ordering Respondent to cease and desist from violating laws pertaining to unlawful discrimination, the forum also ordered Respondent to complete, at its own expense, training on preventing discrimination in the workplace, including OFLA and other protected types of leave, and to create and implement policies pertaining to OFLA and other types of protected leave that accurately reflects Oregon law. ORS 659A.171(1), ORS 659A.183(1), OAR 839-009-0270(1), and OAR 839-009-030(3).

1 The above-entitled case was assigned to Caroline Holien, designated as
2 Administrative Law Judge ("ALJ") by the Commissioner of the Bureau of Labor and
3 Industries for the State of Oregon. The hearing was held on February 27, 2024, via
4 Zoom video conference application.

5 The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by
6 Administrative Prosecutor Anita Smith, an employee of the Agency. Complainant Brise
7 Bernabo-Minnick ("B. Bernabo-Minnick") was present throughout the hearing.

8 Barry Thiriot ("Thiriot") and Bob Loer ("Loer") appeared at hearing on behalf of
9 the Respondent Lariot Corporation ("Lariot"). Thiriot represented to the forum that he
10 had not received any documents related to this matter and had only learned of the
11 hearing approximately two weeks earlier. Thiriot offered no explanation as to how he
12 learned the date of the hearing without receiving documents; why Dolores Patzke
13 ("Patzke"), a former bookkeeper with Lariot, had left a message with the Administrative
14 Law Judge on February 12, 2024, stating she was assembling papers for the hearing; or
15 why there was no contact by anyone else on behalf of Lariot prior to the hearing date if
16 they received no documents. The Administrative Prosecutor stated that Patzke's
17 voicemail message, which was forwarded to her by the Administrative Law Judge, was
18 the first contact she had with Lariot until she received an email the day before the
19 hearing requesting a copy of the Zoom hearing invitation.

20 The forum declined to relieve Respondent Lariot of the default entered pursuant
21 to the forum's Interim Order Granting Agency Motion for Default issued on January 31,
22 2024. As such, the Respondent was prohibited from participating in any manner in the
23 hearing, "including, but not limited to, the presentation of witnesses or evidence on its
24 own behalf, the examination of Agency witnesses, objection to evidence presented by
25 the Agency, or making of motions or argument" OAR 839-050-0330(3).

1 The Agency called B. Bernabo-Minnick and Megan Bernabo-Minnick ("M.
2 Bernabo-Minnick") as witnesses. The forum received into evidence Administrative
3 Exhibits X1-X19¹ and Agency Exhibits A1-A9 and A10a-A16.

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

8 **FINDINGS OF FACT – PROCEDURAL**

9 1) On June 1, 2021, B. Bernabo-Minnick filed a verified complaint with the
10 Agency's Civil Rights Division alleging Respondent Lariot engaged in unlawful
11 employment practices in that Respondent Lariot retaliated against him and terminated
12 his employment for invoking the Oregon Family Leave Act ("OFLA"). (Ex. A1)

13 2) On July 30, 2021, Respondent Lariot submitted a position statement to the
14 Agency's Civil Rights Division denying B. Bernabo-Minnick's allegations, which was
15 signed by Loer, Respondent Lariot's Director of Operations. (Ex. A5)

16 3) On June 1, 2022, after investigation, the Agency's Civil Rights Division
17 issued a Notice of Substantial Evidence Determination in which it found "substantial
18 evidence of an unlawful practice (retaliation, termination) in violation of ORS 659A.183."
19 (Ex. A6)
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23 ¹ Administrative Exhibits X1-X18 were not marked at the time of hearing. Those exhibits have been
24 marked for the record according to the description of the exhibits set forth in the Exhibit List included in
25 the Dropbox link that the Contested Case Coordinator provided to the parties prior to hearing. Exhibit
X19 is a transcript of the voice mail message that the ALJ forwarded to the Administrative Prosecutor that
was not included in the Dropbox link sent to the parties for hearing. It will be included in the
administrative record as Exhibit X19.

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

1 4) On February 6, 2023, Respondent Lariot filed a Withdrawal of Authority to
2 Transact Business with the Oregon Secretary of State's Office. The Withdrawal
3 appointed the Secretary of State as the agent for service of process for any proceedings
4 on a cause of action that arose while it was authorized to transact business in Oregon.
5 (Exs. X7, A7)

6 5) On October 18, 2023, the forum issued the Notice of Hearing to the
7 Respondent, the Agency, and the Complainant setting the hearing to begin at 9:00 a.m.,
8 on December 12, 2023, with the hearing being conducted using the Zoom video
9 conference application. Together with the Notice of Hearing, the forum sent a copy of
10 the Agency's Formal Charges, a document entitled "Summary of Contested Case Rights
11 and Procedures," containing the information required by ORS 183.413, a document
12 entitled "Servicemembers Civil Relief Act (SCRA) Notification," a multi-language notice
13 explaining the significance of the Notice of Hearing, and a copy of the forum's contested
14 case hearings rules, OAR 839-050-000 to 839-050-0445. (Ex. X2)

15 6) The Notice of Hearing and associated documents were mailed to
16 Respondent Lariot at its last known address of record, via certified and regular mail, and
17 to the Oregon Secretary of State, as Lariot's registered agent. (Exs. X2a, X2h)

18 7) The Formal Charges included the following allegations:

19 a. "Respondent committed an unlawful employment practice by refusing to
20 reinstate Complainant to the position he held before his family leave
21 commenced, in violation of ORS 659A.171(1); ORS 659A.183(2); OAR 839-009-
0270(1); OAR 839-009-0320(3)."

22 b. "Respondent committed an unlawful employment practice by discharging
23 Complainant after he returned from family leave, in violation of ORS
659A.171(1); ORS 659A.183(1); OAR 839-009-0270(1); OAR 839-009-0320(3)."

24 c. "Respondent committed an unlawful employment practice by denying
25 Complainant OFLA leave which he would have used and to which he was
entitled, in violation of ORS 659A.183(1); OAR 839-009-0240(1); OAR 839-009-
0320(3)."

1 d. "Respondent committed an unlawful employment practice by failing to
2 provide Complainant with a written request for information to verify whether
3 Complainant's leave qualified for OFLA and/or failing to notify Complainant if he
was eligible and qualified to take OFLA leave, in violation of ORS 659A.183(1),
(2); OAR 839-009-0250(6)."

4 (Ex. X2b)

5 8) On October 24, 2023, the forum issued an Interim Order Requiring Case
6 Summaries and Setting Case Deadlines, which set Tuesday, November 28, 2023, as
7 the deadline for filing Case Summaries.³ (Ex. X3)

8 9) On November 21, 2023, the Agency filed a Motion for Postponement of
9 Contested Case Hearing seeking to reschedule the hearing from December 12, 2023, to
10 February 27, 2024, due to issues regarding service of the Notice of Hearing issued on
11 October 18, 2023.⁴ The Agency served its motion by mailing the motion and supporting
12 documents via first class mail to the Oregon Secretary of State and to the Respondent
13 at its last known addresses:

15 "Barry Thiriot
16 2960 Maywood Dr., #10
Klamath Falls, OR 97603

17 "Barry Thiriot
18 891 Beatty St.
Medford, OR 97501"

19 (Ex. X5)

20 10) On November 27, 2023, the forum issued an Interim Order Holding Case
21 Summary Filing Deadline in Abeyance to allow Respondent Lariot an opportunity to file
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23 ³ The interim order was mailed to Thiriot at his last known address.

24 ⁴ The Agency did not timely issue a check to pay the fees associated with serving the charging
25 documents on the Oregon Secretary of State due to administrative issues related to the Agency's move in
October 2023. The mailings sent to Lariot at its last known addresses of record were subsequently
returned as undeliverable by the USPS.

1 a response to the Agency's motion for postponement. The interim order was mailed to
2 the Oregon Secretary of State as Respondent Lariot's authorized agent for service of
3 process and to Thiriot at the Klamath Falls and Medford mailing addresses. (Ex. X6)

4 11) On November 29, 2023, after receiving no response from Respondent
5 Lariot to the Agency's motion, the forum issued an Interim Order Granting Agency's
6 Motion for Postponement and rescheduled the matter for hearing to begin on February
7 27, 2024. The interim order included the following:

8 "The Agency outlined the following issues affecting service of the Notice of
9 Hearing and Formal Charges upon the Respondent in its declaration in Support
10 of Agency's Motion for Postponement of Contested Case Hearing:

11 '2. On February 6, 2023, Respondent filed a Withdrawal of Authority
12 with the Oregon Secretary of State's office, appointing the Secretary of
State as the registered agent for Respondent. (Exhibit 1)

13 '3. On October 18, 2023, I filed Formal Charges and a Request for
14 Hearing in the above referenced case. On October 18, 2023, a Notice of
Hearing, setting the Contested Case Hearing for December 12, 2023, was
15 issued.

16 '4. On October 18, 2023, the Notice of Hearing and the associated
documents, were mailed to the Respondent at its address of record, via
17 certified and regular mail, and to the Oregon Secretary of State, as the
registered agent.

18 '5. On October 31, 2023, I discovered I had inadvertently failed to send
19 a transmittal memorandum and service fee to the Secretary of State with
the Notice of Hearing as required by ORS 60.121(2).

20 '6. On October 31, 2023, I prepared the transmittal memorandum and
21 requested a check for the service fee from the Agency Fiscal Services in
order to re-serve the Secretary of State.

22 '7. The Agency's Portland, Oregon office, where Fiscal Services are
23 located, was in the process of moving into a new office building. Beginning
24 October 24, 2023, the Agency was packing in anticipation of the move and
was working remotely the week of November 4, through November 10,
25 2023, the dates of the actual move. The move has resulted in a significant
service disruption in Fiscal Services. I have followed up several times

1 about the check for the service fee, but as of the date of this declaration, a
2 check has not been issued. The issuance of the check is beyond my
3 control.

4 '8. As a result of the delay of service upon the Secretary of State, the
5 20-day deadline for Respondent to file an answer will expire after
6 December 12, 2023, the date currently set for the hearing to begin. OAR
7 839-050-0130(4).

8 '9. The Agency attempted to serve Respondent with the Notice of
9 Hearing and associated documents at the address listed on the
10 Withdrawal of Authority and at an alternate address Respondent listed
11 with the Agency. (Exhibit 1; Exhibit 2) According to the United States
12 Postal Service, they have been unable to deliver the documents because
13 there was no authorized recipient at the first address and the address was
14 vacant at the second. (Exhibit 3.)"

15 **ORS 839-050-0150 GOVERNS POSTPONEMENT REQUESTS**

16 "OAR 839-050-0150(5)(a) provides:

17 '(a) Any participant making a request for a postponement of any part of the
18 contested case proceeding must state in detail the reason for the request.
19 The Administrative Law Judge may grant the request for good cause
20 shown. In making this determination, the Administrative Law Judge will
21 consider:

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

26 "There have been no previous postponements granted in this case. The
27 Agency's request was filed with the forum on November 21, 2023, which is
28 approximately two weeks prior to the contested case hearing date of December
29 12, 2023. Given the issues affecting service of the Notice of Hearing and Formal
30 Charges that were for reasons beyond the Agency's control, postponement of the
31 hearing is necessary to allow for proper service of the charging document as
32 required by ORS 183.415(2) and to allow the Respondent an opportunity to
33 timely file an answer to the Formal Charges. There is no reasonable alternative
34 to postponement. The Agency has, therefore, established good cause to
35 postpone the contested case hearing.

1 “The Agency’s motion to postpone the contested case hearing from
2 December 12, 2023, to February 27, 2024, is hereby **GRANTED**. Respondent
3 shall update its contact information with both the Administrative Prosecutor and
4 the Contested Case Coordinator, including providing an email address to which
 communications can be sent to and received by the Respondent. The Forum will
 issue an updated Interim Order Requiring Case Summaries to be Filed and
 Setting Case Deadlines.”

5 (Ex. X7)

6 12) The Interim Order Granting Agency’s Motion for Postponement was
7 mailed to the Oregon Secretary of State, as Respondent Lariot’s registered agent, and
8 to Thiriot at the Klamath Falls and Medford mailing addresses. (Ex. X7)

9 13) On December 19, 2023, the forum mailed a copy of the Notice of Hearing
10 to the Oregon Secretary of State, the Respondent at its last two known addresses, the
11 Agency, and the Complainant. Together with the Notice of Hearing, the forum sent a
12 copy of the Agency’s Formal Charges, a document entitled “Summary of Contested
13 Case Rights and Procedures” containing the information required by ORS 183.413, a
14 document entitled “Servicemembers Civil Relief Act (SCRA) Notification,” a multi-
15 language notice explaining the significance of the Notice of Hearing, and a copy of the
16 forum’s contested case hearings rules, OAR 839-050-000 to 839-050-0445. (Ex. X8)

17 14) On January 8, 2024, the Contested Case Coordinator received the
18 Acknowledgement of Service from the Oregon Secretary of State. (Ex. X9)

19 15) On January 23, 2024, the Agency filed a Motion for Default citing
20 Respondent Lariot’s failure to file an answer to the charging documents as required by
21 OAR 839-050-0130(4). (Ex. X11)

22 16) On January 23, 2024, the Agency filed a Motion for Protective Order
23 arguing that a protective order was necessary due to certain documents the Agency
24 intended to offer at hearing contained confidential information. (Ex. X10)

1 17) On January 25, 2024, the forum issued an Amended Interim Order
2 Requiring Case Summaries to be Filed and Setting Case Deadlines. The interim order
3 set February 13, 2024, as the deadline for filing case summaries and included
4 information for joining the hearing on Zoom. The interim order was mailed to the
5 Oregon Secretary of State's office and to Thiriot at the Klamath Falls and Medford
6 mailing addresses. (Exs. X12, X13)

7 18) On January 31, 2024, the forum issued an Interim Order Granting
8 Agency's Motion for Default:

9 "On January 23, 2024, the Agency filed a motion for default against
10 Respondent Lariot Corporation ('Respondent'). The Agency's motion requests
11 that the forum find that Respondent was served the charging document pursuant
to OAR 839-050-0030(1) and is in default. Respondent did not timely file a
response to the Agency's motion. OAR 839-050-0150.

12 "OAR 839-050-0030(4) requires that 'a party must file an answer within 20
13 days after service of the [Formal Charges].' OAR 839-050-0030(1), describes
the methods of serving Formal Charges and states, in pertinent part:

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

17 '(a) Receipt by the party or the party's representative; or

18 '(b) Mailing when sent by registered or certified mail to the correct address
19 of the party or the party's representative."

20 "OAR 839-050-0330(1)(a) provides that default may occur when '[a] party
21 fails to file a required response, including * * * an answer, within the time
specified in the [Formal Charges].'

22 "The Agency argues that Respondent is in default because it was served
23 with the Notice of Hearing and Formal Charges on December 13, 2023, and
24 failed to file an answer on or before January 3, 2024. In support of its motion, the
Agency submitted the Withdrawal of Authority to Transact Business
25 ("Withdrawal") that Respondent filed with the Oregon Secretary of State's office
on February 6, 2023, which appointed the Secretary of State as Respondent's
registered agent for service of process. (Ex. A-1) The Agency also submitted the
certified mail return receipt showing that the Agency mailed the charging

1 documents to the Oregon Secretary of State's office via certified mail, as well as
2 the Service of Process from the Oregon Secretary of State's office showing that
3 the documents were received. (Exs. A-6, A-7, A-8) Accordingly, personal service
4 upon the Oregon Secretary of State, Respondent's registered agent, on
5 December 13, 2023, constituted service upon Respondent's "representative"
under OAR 839-050-0030(1)(a). Respondent, having failed to timely file an
answer to the charging documents, is in default, and the Agency's motion is
GRANTED.

Notice of Default

6 "Relief from default may be granted if Respondent shows good cause,
7 within ten days after the date of this order, for failing to timely file an answer. A
8 request for relief must be in writing and accompanied by a written statement,
9 together with appropriate documentation, setting forth the facts supporting the
10 claim of good cause. OAR 839-050-0340. Any document filed by Respondent
should be submitted by an attorney or should be filed together with a statement
indicating that the person filing the document is an authorized representative of
the party. See OAR 839-050-0110(1), (2).

11 "As Respondent is in default, the hearing in this matter will be limited to
12 the Agency's presentation of its prima facie case. The hearing will be conducted
13 by Zoom on the currently scheduled hearing date of February 27, 2024,
beginning at 9:00 a.m."

14 The interim order included the Zoom meeting invitation for the hearing. (Ex. X14)

15 19) On January 13, 2024, the forum issued an Interim Order Granting
16 Agency's Motion for Protective Order.⁵ (Ex. X15)

17 20) On February 8, 2024, the Agency filed its Case Summary. (Ex. X17)

18 21) On February 12, 2024, the ALJ received a voice mail message from
19 Dolores Patzke on behalf of Respondent Lariot. Patzke indicated she was assembling
20 documents for the hearing and asked for the ALJ to return her phone call. The ALJ
21 forwarded the message, which was received through the Agency's AT&T Office@Hand,
22 to the Contested Case Coordinator and to the Administrative Prosecutor. In order to
23 avoid ex parte contact with a party, the ALJ did not return Patzke's phone call or have
24 any other contact with Patzke or any Lariot representative. The forum did not receive
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⁵ The mailings sent to Thiriot were returned as undeliverable. (See Ex. X16.)

1 any documents from Patzke or Respondent Lariot and received no request within 10
2 days requesting relief from the default. (Ex. X19,⁶ Hearing Record)

3 22) On February 26, 2024, the Agency filed an Amended Case Summary that
4 included updated wage loss calculations. (Ex. X18)

5 23) At the start of hearing, pursuant to ORS 183.417(5), the ALJ orally
6 informed the participants of the issues to be addressed, the matters to be proved, and
7 the procedures governing the conduct of the hearing. (Hearing Record)

8 24) On July 10, 2024, the ALJ issued a proposed order that notified the
9 participants that they were entitled to file exceptions to the proposed order within ten
10 days of its issuance. On July 12, 2024, the Agency filed its exceptions to the proposed
11 order. On July 19, 2024, the Respondent filed its exception to the proposed order. The
12 exceptions are addressed in the Opinion section of this Final Order.

13 FINDINGS OF FACT – THE MERITS

14 1) At all times material herein, Respondent Lariot was a foreign business
15 corporation registered in the State of Oregon that employed 25 or more persons,
16 including Complainant B. Bernabo-Minnick, during each of 20 or more calendar
17 workweeks in 2020 and 2021. (Testimony of B. Bernabo-Minnick; Exs. A5, A7)

18 2) Respondent Lariot owned and operated approximately 15 Kentucky Fried
19 Chicken (“KFC”) franchises throughout Oregon during the period relevant to this matter.
20 Barry Thiriot was the owner of Lariot, and Bob Loer served as Lariot’s Director of
21 Operations. Melissa Overton (“Overton”) was Lariot’s District Manager and B. Bernabo-
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25 ⁶ As noted above, a transcript of the message was forwarded to the Administrative Prosecutor and was
to be included in the forum file. The transcript is now marked as Ex. X19 and is part of the administrative
record.

1 Minnick's supervisor throughout much of B. Bernabo-Minnick's employment with Lariot.

2 (Testimony of B. Bernabo-Minnick; Ex. A5)

3 3) On or about July 16, 2015, Respondent Lariot hired B. Bernabo-Minnick
4 as a General Manager trainee. On or about September 7, 2015, B. Bernabo-Minnick
5 became the General Manager of the KFC location in Redmond, Oregon. B. Bernabo-
6 Minnick has worked in some capacity for various KFC franchises for approximately 17
7 years. (Testimony of B. Bernabo-Minnick; Ex. A5)

8 4) B. Bernabo-Minnick worked primarily at the KFC location in Redmond. He
9 also worked at KFC locations in Bend and Eugene when directed to do so by either
10 Overton or Loer. B. Bernabo-Minnick received additional compensation when he
11 worked at locations other than Redmond to cover the transportation costs associated
12 with traveling to and from those locations. (Testimony of B. Bernabo-Minnick)

13 5) B. Bernabo-Minnick's duties as a General Manager included managing the
14 daily operations of the restaurant, including employee scheduling and inventory
15 management. B. Bernabo-Minnick worked an average of 50 hours per week.
16 (Testimony of B. Bernabo-Minnick)

17 6) B. Bernabo-Minnick's annual salary was approximately \$52,500, and his
18 average monthly earnings were \$5,046. B. Bernabo-Minnick also received benefits and
19 accrued paid vacation time. (Testimony of B. Bernabo-Minnick; Exs. A10-A13)

20 7) Lariot managers were potentially eligible for bonuses that were based on
21 food costs, drive-thru times, labor, cost of paper goods and other performance
22 measures. The manager had to work at the location for three months or longer in order
23 to be eligible for the bonus. B. Bernabo-Minnick rarely received a bonus or received
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1 reduced bonuses, because he often worked at various Lariot locations for less than
2 three months. (Testimony of B. Bernabo-Minnick; Exs. A10-A13)

3 8) B. Bernabo-Minnick and his wife began the pre-approval process for a
4 home mortgage in 2017. B. Bernabo-Minnick told Overton, Loer, and his co-workers
5 that he was intending to purchase a home in Madras, Oregon. B. Bernabo-Minnick
6 submitted a letter of recommendation from Loer that was dated October 19, 2017, as
7 part of the mortgage application process. (Testimony of B. Bernabo-Minnick; Ex. A8)

8 9) On October 6, 2020, B. Bernabo-Minnick and his family moved into their
9 Madras home, which is approximately 20 minutes from the Redmond KFC location.
10 (Testimony of B. Bernabo-Minnick)

11 10) In October 2020, B. Bernabo-Minnick advised Overton and Loer that his
12 wife was pregnant and that he intended to take time off following the birth of their child
13 in January 2021. B. Bernabo-Minnick discussed taking OFLA leave with Overton and
14 was told that he did not need to complete paperwork for family leave. B. Bernabo-
15 Minnick was familiar with OFLA due to having various employees who reported to him
16 over the years having made similar requests for family leave. Neither Overton nor Loer
17 provided B. Bernabo-Minnick with any information regarding OFLA or notice as to his
18 eligibility for OFLA leave. (Testimony of B. Bernabo-Minnick)

19 20 11) From January 19, 2021, through February 9, 2021, B. Bernabo-Minnick
21 took employer-approved family leave. (Testimony of B. Bernabo-Minnick; Ex. A5)

22 12) At all times material in 2020 and 2021, B. Bernabo-Minnick had OFLA
23 leave available to him. (Testimony of B. Bernabo-Minnick; Exs. A1, A2, A5)

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1 13) Prior to the start of his family leave, B. Bernabo-Minnick told Overton and
2 Loer that he only wanted to work at the Redmond location due to the strain the
3 additional travel time caused for him and his growing family, which then included five
4 children under the age of twelve. Overton told B. Bernabo-Minnick that she did not think
5 it would be an issue, which led B. Bernabo-Minnick to believe that he would be returning
6 to the General Manager position at the Redmond location when he returned from family
7 leave. (Testimony of B. Bernabo-Minnick)

8 14) B. Bernabo-Minnick's drive from Madras to the Redmond KFC location
9 was approximately 20 minutes. B. Bernabo-Minnick's drive to the Bend KFC location
10 from his home in Madras was approximately 60 minutes with good road conditions. The
11 drive could be 90 minutes or longer during the winter months depending on the weather
12 and the road conditions. (Testimony of B. Bernabo-Minnick)

13 15) On February 10, 2020, B. Bernabo-Minnick returned from his family leave.
14 B. Bernabo-Minnick asked Overton for additional time off due to an issue related to the
15 birth of his child. Overton informed B. Bernabo-Minnick that she was no longer his
16 supervisor and directed him to speak with Area Manager Youssri Aly, who had become
17 B. Bernabo-Minnick's supervisor during his absence. (Testimony of B. Bernabo-Minnick)

18 16) Aly and Loer met with B. Bernabo-Minnick later that same day. Before B.
19 Bernabo-Minnick could request OFLA leave, he was told that he was being transferred
20 to the Bend location so he could work with the manager there to "sharpen his skills."
21 Loer cited the reduced bonuses B. Bernabo-Minnick had received during the past year
22 as the reason for B. Bernabo-Minnick's transfer to the Bend location. The transfer would
23 have had no effect on B. Bernabo-Minnick's annual salary but he could potentially have
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1 been eligible for bonuses based on the performance of the Bend location.
2 Compensation for travel expenses was not discussed. (Testimony of B. Bernabo-
3 Minnick: Ex. A5).

4 17) B. Bernabo-Minnick was surprised to learn that he required additional
5 training, because one of his responsibilities had included training new managers. B.
6 Bernabo-Minnick was not aware that there had been any concerns regarding his job
7 performance; nor was he aware of any perceived deficiencies in his performance prior
8 to taking his family leave. (Testimony of B. Bernabo-Minnick; Ex. A5)
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10 18) Based upon his conversation with Aly and Loer, B. Bernabo-Minnick
11 understood that he would be terminated if he did not accept the transfer to the Bend
12 location. (Testimony of B. Bernabo-Minnick)

13 19) After being told of the transfer, B. Bernabo-Minnick " * * * chose to leave.
14 [He] quit." B. Bernabo-Minnick did not request additional family leave as he had
15 planned due to the ultimatum presented to him. B Bernabo-Minnick then left work
16 without finishing his shift. B. Bernabo-Minnick had no further contact with Respondent
17 Lariot after he left work that day. (Testimony of B. Bernabo-Minnick)

18 20) B. Bernabo-Minnick was unemployed for approximately eight months
19 before he began working full-time as a laborer at Keith Manufacturing, where he worked
20 from October 2021 through January 31, 2022. B. Bernabo-Minnick had not performed
21 that type of work before, and he experienced debilitating pain in his arms and hands as
22 a result of the physical nature of the work at Keith Manufacturing. His hourly wage at
23 Keith Manufacturing was far less than his salary at Lariot. B. Bernabo-Minnick earned
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1 approximately \$5,618 from his employment with Keith Manufacturing. (Testimony of B.
2 Bernabo-Minnick: Ex. A10a)

3 21) B. Bernabo-Minnick applied for several jobs in his area, including jobs in
4 customer service, food service, and manufacturing. B. Bernabo-Minnick had several
5 interviews during this period. (Testimony of B. Bernabo-Minnick)

6 22) Having never lost a job before, B. Bernabo-Minnick was devastated by
7 Respondent Lariot's decision to give him what he believed to be an ultimatum to quit his
8 job. B. Bernabo-Minnick felt useless and unsure as to the future. He had trouble
9 sleeping and lost almost 20 pounds. B. Bernabo-Minnick was depressed and anxious,
10 and there was a good deal of tension related to money in his relationship with his wife.
11 B. Bernabo-Minnick was short-tempered with his children despite his efforts not to take
12 his worries out on them. The situation caused a good deal of distress for not only B.
13 Bernabo-Minnick, but also for his wife. (Testimony of B. Bernabo-Minnick)

15 23) B. Bernabo-Minnick and his wife experienced difficult financial issues
16 during the period following his separation from Lariot. Their family fell behind on bills,
17 with many of their bills being referred to collections. Their family had to seek assistance
18 with some of their household expenses. Due to the impact of COVID, B. Bernabo-
19 Minnick experienced delays in applying for and receiving unemployment benefits and
20 experienced difficulties in finding suitable work. (Testimony of B. Bernabo-Minnick)

22 24) On May 2, 2022, B. Bernabo-Minnick began working for the Oregon
23 Department of Corrections ("DOC") as a Corrections Officer on a full-time basis. On or
24 about November 20, 2022, B. Bernabo-Minnick took a medical leave of absence after
25 suffering an injury. B. Bernabo-Minnick returned to work for the DOC on a full-time

1 basis beginning January 1, 2023. B. Bernabo-Minnick earned a total of \$87,763 from
2 his employment with DOC through October 31, 2023. (Testimony of B. Bernabo-
3 Minnick: Ex. A10a)

4 25) At or near the time he received the DOC job offer, B. Bernabo-Minnick
5 received an unsolicited job offer from the Stewart Group, which he understood was a
6 company owned by a relative of Thiriot that had taken over ownership of Lariot. B.
7 Bernabo-Minnick declined the Stewart Group's job offer due to his having accepted the
8 DOC job offer. (Testimony of B. Bernabo-Minnick)

9 26) During the approximately 35 months following his separation from Lariot,
10 B. Bernabo-Minnick would have earned approximately \$5,046 per month based upon
11 his annual salary of \$52,500 in 2022 for a total of \$176,610. B. Bernabo-Minnick had
12 actual earnings in the amount of \$101,458 following his separation and through October
13 32, 2023. B. Bernabo-Minnick experienced lost wages in the amount of \$75,152.
14 (Testimony of B. Bernabo-Minnick; Ex. A10a)

15 27) Witnesses B. Bernabo-Minnick and his wife, M. Bernabo-Minnick, were
16 credible. The forum credited their testimony in their entirety.

17 CONCLUSIONS OF LAW

18 1) At all times material herein, Respondent Lariot was a foreign business
19 corporation registered to do business in Oregon. Respondent was a "person," an
20 "employer," and a "Respondent." ORS 659A.001(4)(a), (9)(a), (12); OAR 839-003-
21 0005(12), (13); OAR 839-005-0003(5), (14).
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1 2) At all times material herein, Respondent Lariot employed 25 or more
2 people in the state of Oregon and was a covered employer under ORS 659A.150(1);
3 ORS 659A.153(1); OAR 839-009-0210(5).

4 3) Respondent Lariot committed an unlawful employment practice by refusing
5 to restore Complainant B. Bernabo-Minnick to the position he held before his family
6 leave commenced in violation of ORS 659A.171(1); ORS 659A.183(2); OAR 839-009-
7 0270(1); OAR 839-00900320(3).

8 4) Respondent Lariot constructively discharged Complainant B. Bernabo-
9 Minnick because of his use of OFLA leave. ORS 659A.171(1); ORS 659A.183(1); OAR
10 839-005-0011; OAR 839-009-0270(1); OAR 839-009-0320(3).

11 5) Respondent Lariot did not deny Complainant B. Bernabo-Minnick OFLA
12 leave. ORS 659A.183(1); OAR 839-009-0240(1); OAR 839-009-0320(3)

13 6) Respondent Lariot failed to provide Complainant B. Bernabo-Minnick with a
14 written request for information pertaining to OFLA leave and/or failed to notify him of his
15 eligibility for OFLA leave in violation of ORS 659A.183(1), (2); OAR 839-009-0250(6).

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

18 8) Pursuant to ORS 659A.850, the Commissioner of the Bureau of Labor and
19 Industries has the authority under the facts and circumstances of this case to award
20 Complainant economic and non-economic damages for emotional and mental suffering
21 sustained and to protect the rights of Complainant and others similarly situated. The
22 sum of money awarded and the other actions required of Respondents in the Order
23 below are an appropriate exercise of that authority.
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OPINION

The Agency alleged that Respondent committed several unlawful practices related to B. Bernabo-Minnick's request for and utilization of family leave. Specifically, the Agency alleged that: (1) Respondent Lariot refused to reinstate B. Bernabo-Minnick to the position he held before his family leave commenced, in violation of ORS 659A.171(1); ORS 659A.183(2); OAR 839-009-0270(1); OAR 839-009-0320(3); (2) Respondent Lariot discharged B. Bernabo-Minnick after he returned from family leave, in violation of ORS 659A.171(1); ORS 659A.183(1); OAR 839-009-0270(1); OAR 839-009-0320(3); (3) Respondent Lariot denied B. Bernabo-Minnick OFLA leave, which he would have used and to which he was entitled, in violation of ORS 659A.183(1); OAR 839-009-0240(1); OAR 839-009-0320(3); and (4) Respondent Lariot failed to provide B. Bernabo-Minnick with a written request for information to verify whether his leave qualified for OFLA and/or failing to notify him if he was eligible and qualified to take OFLA leave, in violation of ORS 659A.183(1), (2); OAR 839-009-0250(6)."

LARIOT'S LIABILITY UNDER ORS 659A.171(1) AND ORS 659A.183(2)

The Oregon Family Leave Act ("OFLA) prohibits a covered employer from retaliating or in any way discriminating "against an individual with respect to hire or tenure or any other term or condition of employment because the individual has inquired about the provisions of ORS 659A.150 * * * to 659A.186 * * *, submitted a request for family leave or invoked any provision of ORS 659A.150 * * * to 659A.186 * * *." ORS 659A.183(2).

When a respondent defaults in a case in which the Agency has issued Formal Charges, the Agency need only establish a prima facie case to support the allegations

1 of its charging document in order to prevail. *In the Matter of Vision International*
2 *Petroleum, LLC & Hai Chheng Gov*, 37 BOLI 187, 196 (2019).

3 To establish a prima facie case that an employer committed an unlawful
4 employment practice by failing to restore an employee to the position held at the time
5 the family leave began, the Agency must establish that (1) the employer was a “covered
6 employer;” (2) the employee was an eligible employee, i.e., he was employed by a
7 “covered employer” at least 180 calendar days immediately preceding the date his
8 family leave began; (3) the employee took leave that qualified for OFLA and to which he
9 was entitled; and (4) the employee attempted to return to work after taking family leave
10 and was denied or refused restoration to the position held prior to the commencement
11 of his family leave. *In the Matter of Entrada Lodge, Inc.*, 164 BOLI 182, 183 (2000).

13 The preponderance of the evidence shows Respondent Lariot was a “covered
14 employer,” as defined under ORS 659A.153(1), and it employed B. Bernabo-Minnick for
15 more than 180 prior to the commencement of his family leave. ORS 659A.156(1).
16 From January 19, 2021, through February 9, 2021, B. Bernabo-Minnick began family
17 leave to attend to the birth of his child, which is leave allowed for under OFLA. ORS
18 659A.159(1). The Agency has, therefore, established the first three elements of its
19 prima facie case. The remaining issue is whether Respondent Lariot failed to restore B.
20 Bernabo-Minnick to the position he held prior to the start of his family leave.

21 ORS 659A.171(1) provides that “[a]fter returning to work after taking family leave
22 * * *, an eligible employee is entitled to be restored to the position of employment held
23 by the employee when the leave commenced, if that position still exists, without regard
24 to whether the employer filled the position with a replacement worker during the period
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1 of family leave." Here, the position in Redmond still existed. There was no evidence as
2 to whether it had been filled. However, even if the position had been filled, Respondent
3 Lariot should have restored B. Bernabo-Minnick to that position directly upon his return
4 from leave.

5 Based on the evidence before the forum, the forum finds that Respondent failed
6 to restore B. Bernabo-Minnick to the position he held prior to the start of his family
7 leave, which still existed at the time he returned from family leave, in violation of ORS
8 659A.171(1); ORS 659A.183(2); OAR 839-009-0270(1); and OAR 839-009-0320(3).

9 10 **RETALIATION FOR USE OF OFLA LEAVE**

11 The Agency alleges that Respondent Lariot committed an unlawful employment
12 practice in that it retaliated against B. Bernabo-Minnick by discharging him after he
13 returned from his family leave in violation of ORS 659A.171(1); ORS 659A.183(1) OAR
14 839-009-0270(1); and OAR 839-009-0320(3).

15 While OFLA does not explicitly provide a cause of action for "interference," "[a]
16 majority of decisions in the District of Oregon, however, have concluded that the OFLA
17 included a cause of action for interference." *Khamnaye v. Schnitzer Steel Industries,*
18 *Inc.*, No. 3:22-cv-00391-AR, 2023 WL 4936815, at *12 (D Or June 16, 2023), citing
19 *Stillwell v. Old Dominions Freight Line, Inc.*, No. 3:19-cv-1789-SI, 2021 WL 3056375, at
20 *6 (D Or July 20, 2021).⁷ See also *Carter v. Fred Meyer Jewelers, Inc.*, No. 3:16-cv-
21 00883-YY, 2019 WL 2744190, at *3 (D Or Apr. 10, 2019) ("Although often styled as
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25 ⁷ Although not binding, the forum looks to federal law when it is instructive in its application of Oregon's civil rights laws. *In the Matter of Kenneth Wallstrom*, 32 BOLI 63, 92 (2012).

1 'retaliation' claims, allegations that a plaintiff was fired for taking leave are analyzed as
2 claims for 'interference' with FLMA (sic) or OFLA rights.").

3 To establish a prima facie case of retaliation or discrimination for purposes of
4 OAR 839-009-0320, the Agency must show that: 1) complainant "inquired about OFLA
5 leave, submitted a request for OFLA leave or invoked any provision of OFLA;" 2)
6 respondent made an employment decision that adversely affected complainant; and 3)
7 there is a causal connection between complainant's protected OFLA activity and
8 Respondent's adverse action. *In the Matter of WINCO Foods, Inc.*, 28 BOLI 259, 299-
9 300 (2007).

10
11 To establish the requisite causal connection, the Agency must show that the use
12 or attempted use of OFLA leave was a "negative factor" in respondent's decision to take
13 the adverse employment action. *See Stillwell v. Old Dominions Freight Line, Inc.*, No.
14 3:19-cv-1789-SI, 2021 WL 3056375, at *6 (D Or July 20, 2021). It is undisputed that B.
15 Bernabo-Minnick, as an eligible employee, took family leave as allowed for under the
16 OFLA. Upon his return to work, B. Bernabo-Minnick learned that he was being
17 transferred to the Bend location, which he understood to be a permanent change. This
18 change added additional time to B. Bernabo-Minnick's commute, which could be
19 treacherous during inclement weather, and posed additional strain for his growing
20 family. B. Bernabo-Minnick testified that, after learning of the transfer, he "chose to
21 leave. I quit." (Proposed Finding of Fact – The Merits No. 19) There is no evidence
22 showing that Respondent Lariot informed B. Bernabo-Minnick that he was being
23 discharged. However, Respondent Lariot is not relieved of its duties under OFLA
24 because B. Bernabo-Minnick made the decision to quit. The issue then becomes
25

1 whether B. Bernabo-Minnick's separation from his employment Lariot constituted a
2 constructive discharge.

3 B. Bernabo-Minnick's Resignation was a Constructive Discharge

4 "Constructive discharge occurs when an individual leaves employment because
5 of unlawful discrimination. The elements of a constructive discharge are:

6 (1) The employer intentionally created or intentionally maintained
7 discriminatory working conditions related to the individual's protected class
status;

8 (2) The working conditions were so intolerable that a reasonable person in
9 the individual's circumstances would have resigned because of them;

10 (3) The employer desired to cause the individual to leave employment as
11 a result of those working conditions, or knew or should have known that
the individual was certain, or substantially certain, to leave employment as
a result of the working conditions; and

12 (4) The individual left employment as a result of the working conditions."

13 OAR 839-005-0011.

14 "This forum has consistently held that if an employer imposes objectively
15 intolerable working conditions, i.e., that a reasonable person in complainant's position
16 would have resigned under those conditions, the employee's resignation due to those
17 conditions is a constructive discharge." *In the Matter of Lioness Holdings, LLC*, 36 BOLI
18 229, 245 (2018).

19
20 In this case, B. Bernabo-Minnick's protected class status is based upon his
21 having invoked a right under OFLA, i.e. taking family leave for which he was eligible and
22 to which he was entitled. B. Bernabo-Minnick informed both Overton and Loer prior to
23 the start of his family leave that he no longer wanted to work at other Lariot locations
24 due to the strain the additional travel time would cause for his growing family, he also
25 informed them of his buying a home in Madras, significantly closer to the Redmond

1 location. Respondent Lariot knew or should have known assigning B. Bernabo-Minnick
2 to work at the Bend location rather than restoring him to his position as General
3 Manager of the Redmond location was certain or substantially certain to cause him to
4 leave employment as a result of the working conditions. B. Bernabo-Minnick did, in fact,
5 leave his employment with Lariot as a result of the decision to transfer him to Bend.
6 Based on the evidence before the forum, the forum finds that a reasonable person in B.
7 Bernabo-Minnick's position would find the working conditions so intolerable as to face
8 the uncertainties of unemployment rather than remain in the position under the
9 circumstances imposed by Respondent Lariot. Therefore, the forum finds that B.
10 Bernabo-Minnick's resignation constitutes a constructive discharge.

11
12 Causal Connection Between the Transfer and use of OFLA Leave

13 The remaining element of the prima facie case of retaliation that the Agency must
14 establish is whether there is a causal connection between the adverse employment
15 action and B. Bernabo-Minnick's use of family leave. In short, the Agency must
16 establish that B. Bernabo-Minnick's use or attempted use of family leave was a
17 "negative factor" in its decision to transfer him to another location.

18 Under the "specific intent" theory of discrimination, proof of a causal connection
19 may be established through evidence that shows a respondent knowingly and
20 purposefully discriminated against a complainant because of the complainant's
21 membership in a protected class. OAR 839-005-0010(1)(a)(A). See, e.g., *In the Matter*
22 *of Cyber Center, Inc., dba Cybercenter Sports Grill and Gary Speaks as Aider/Abettor*,
23 32 BOLI 11, 32 (2012) citing *In the Matter of WINCO Foods, Inc.*, 28 BOLI 259, 300
24 (2007); *In the Matter of Wal-Mart Stores, Inc.*, 24 BOLI 37, 61 (2002). While specific
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1 intent may be established by direct evidence of a respondent's discriminatory motive, it
2 may also be shown through circumstantial evidence. *Id.* While specific intent may be
3 established by direct evidence of a respondent's discriminatory motive, it may also be
4 shown through circumstantial evidence. See *In the Matter of Wal-Mart Stores, Inc.*, 24
5 BOLI 37, 61 (2002), citing *In the Matter of Sierra Vista Care Center*, 9 BOLI 281, 296-97
6 (1991) ("[E]vidence includes inferences. There may be more than one inference to be
7 drawn from the basic fact found; it is [the] Forum's task to decide which inference to
8 draw. Thus, the absence of direct evidence of [respondent's] specific intent is not
9 determinative because such intent may be shown by the circumstantial evidence
10 referred to herein"). (citations omitted) See also *Boynton-Burns v. University of Oregon*,
11 197 Or App 373, 380-81, 105 P3d 893, 897-898 (2005), quoting *DeCintio v.*
12 *Westchester County Medical Center*, 821 F2d 111, 115 (2d Cir), *cert den* 484 US 965,
13 108 S Ct 455 (1987)("Proof of a causal connection can be established [1] indirectly, by
14 showing that the protected activity was followed closely by discriminatory treatment or
15 through other evidence such as disparate treatment of fellow employees who engaged
16 in similar conduct, or [2] directly, through evidence of retaliatory animus directed against
17 a [complainant] by the [respondent]"). Further, "The causal link between a protected
18 activity and the alleged retaliatory action 'can be inferred from timing alone' when there
19 is a close proximity between the two." *Thomas v. City of Beaverton*, 379 F.3d 802, 812
20 (9th Cir. 2004) (internal citation omitted). The Agency, at all times, has the burden of
21 proving that Complainant was terminated or otherwise discriminated against for unlawful
22 reasons. *Wal-Mart* at 61.
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1 There is no direct evidence of discriminatory intent in this case. However, given
2 the short proximity of time between the protected activity and the adverse action, the
3 causal link can be inferred that the decision to transfer B. Bernabo-Minnick, which
4 ultimately gave rise to a constructive discharge, was retaliation for his having invoked a
5 right under OFLA. Given the timing of Respondent Lariot's decision to transfer B.
6 Bernabo-Minnick after his use of family leave, the evidence of record establishes B.
7 Bernabo-Minnick's use of his family leave was a negative factor in Respondent's Lariot's
8 decision to transfer him to a different location. The Agency has established the requisite
9 causal link of the prima facie retaliation claim. Therefore, the Agency has shown that
10 Respondent Lariot retaliated and/or discriminated against B. Bernabo-Minnick based
11 upon his use of family leave in violation of ORS 659A.171(1); ORS 659A.183(2); OAR
12 839-009-0270(1); and OAR 839-009-0320(3).

14 **DENIAL OF OFLA LEAVE**

15 The Agency alleges Respondent Lariot denied B. Bernabo-Minnick OFLA leave,
16 which he would have used and to which he was entitled, in violation of ORS
17 659A.183(1), OAR 839-009-0240(1); and OAR 839-009-0320(3). To establish a prima
18 facie case, the Agency must show that: 1) Respondent Lariot was a covered employer
19 as defined in ORS 659A.153(1); 2) B. Bernabo-Minnick was an eligible employee, i.e.,
20 he was employed by a covered employer at least 180 calendar days immediately
21 preceding the date his family leave began; 3) B. Bernabo-Minnick's leave was for a
22 qualifying reason under OFLA; 4) B. Bernabo-Minnick used or would have used OFLA
23 leave for the qualifying reason; and 5) Respondent Lariot did not allow B. Bernabo-
24 Minnick to use OFLA leave to which he was entitled in the manner required by ORS
25 659A.150 to 659A.186. *In PCC Structural*s, 37 BOLI 246, 258 (2020).

1 Respondent Lariot allowed B. Bernabo-Minnick to take leave from January 19,
2 2021, through February 9, 2021. B. Bernabo-Minnick testified that, at the end of his
3 family leave, he informed Overton that he needed to take additional time off but was told
4 that he needed to speak to Youssri Aly, who had become Lariot's District Manager and
5 B. Bernabo-Minnick's new supervisor during his absence. B. Bernabo-Minnick testified
6 that when he met with Aly and Loer, he was told of Respondent Lariot's decision to
7 transfer him before he was able to request additional family leave. After learning of the
8 transfer, B. Bernabo-Minnick informed Aly and Loer that he was quitting and left the
9 workplace without completing his shift. The forum therefore concludes based on the
10 evidence of record that Respondent Lariot did not deny B. Bernabo-Minnick OFLA leave
11 in violation of ORS 659A.183(10); OAR 839-009-0240(1); OAR 839-009-0320(3).

13 **FAILURE TO PROVIDE INFORMATION REGARDING OFLA LEAVE**

14 The Agency alleges that Respondent Lariot failed to provide B. Bernabo-Minnick
15 with a written request for information to verify whether his leave qualified for OFLA
16 and/or failed to notify B. Bernabo-Minnick if he was eligible and qualified to take OFLA
17 leave in violation of ORS 659A.183(1), (2) and OAR 839-009-0250(6). B. Bernabo-
18 Minnick credibly testified that, based on his knowledge of OFLA that he gained by
19 working with employees requesting OFLA leave, he requested OFLA paperwork from
20 Overton prior to the birth of his child. B. Bernabo-Minnick testified Overton told him that
21 was not necessary and that he would be able to take family leave. There is no evidence
22 showing that Overton or anyone else with the authority to act on behalf of Lariot
23 provided B. Bernabo-Minnick with a written request for information to verify his eligibility
24 for OFLA leave. The forum therefore concludes that Respondent Lariot failed to provide
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1 B. Bernabo-Minnick with a written request for information to verify his leave qualified for
2 OFLA and/or notice if he was eligible and qualified to take OFLA leave in violation of
3 ORS 659A.183(1) and OAR 839-009-0250(6).

4 **DAMAGES**

5 Lost Wages

6
7 The purpose of an economic damages award in an employment discrimination
8 case is to compensate a complainant for the lost wages she would have received but for
9 the unlawful employment practice. *Vision International*, 37 BOLI at 200. Economic
10 damage awards are calculated to make a complainant whole for injuries suffered as a
11 result of the unlawful termination. *Id.*

12 An award for lost wages involves a three-step analysis. First, whether
13 Complainant exercised due diligence in seeking work to mitigate his wage loss. OAR
14 839-003-0090(3). Second, is to determine the amount of wages Complainant would
15 have earned, but for the unlawful termination, to be offset by his subsequent earned
16 income. OAR 839-003-0090(3)(a), and third, when the period for which lost wages are
17 sought should end. A complainant who is seeking damages for back pay is required to
18 mitigate damages by using reasonable diligence in finding other suitable employment.
19 *In the Matter of Blue Gryphon, LLC, and Flora Turnbull*, 34 BOLI 216, 238 (2015). The
20 burden of proof for failure to mitigate damages lies with the Respondent. *In the Matter*
21 *of Wal-Mart Stores, Inc.*, 24 BOLI 37, 65 (2003).

22
23 B. Bernabo-Minnick engaged in reasonably diligent efforts to seek comparable
24 work following his constructive discharge from Lariot. B. Bernabo-Minnick was unable
25 to obtain employment in his preferred field and ultimately found work as a Corrections

1 Officer for the DOC in May 2022. Prior to his employment with the DOC, B. Bernabo-
2 Minnick worked as a laborer for Keith Manufacturing and earned \$4,978 in wages from
3 October 2021 through December 31, 2021, and \$640 from January 1, 2022, through
4 January 31, 2022. From May 2, 2022, through November 30, 2022, B. Bernabo-Minnick
5 received \$31,835 in wages for work performed for the DOC, and after a medical leave
6 of absence, B. Bernabo-Minnick received \$55,928 in wages for work performed for the
7 Department of Corrections from January 1, 2023, through October 31, 2023.

8
9 The forum adopts the calculations of the Agency in its lost wage assessment set
10 forth in Agency Ex. A10a. As noted in its lost wage assessment, B. Bernabo-Minnick's
11 average monthly earnings from his employment with Lariot was \$5,046. B. Bernabo-
12 Minnick's earnings from January 1, 2021, through October 31, 2023, totaled \$101,458,
13 which includes \$8,077 in wages received from Lariot from January 1, 2021, through
14 February 10, 2021. But for his constructive discharge, B. Bernabo-Minnick would have
15 had earnings amounting to \$176,620 (35 months x \$5,046). B. Bernabo-Minnick is
16 entitled to a lost wage award of \$75,152 (\$176,610 - \$101,458).

17 Emotional Distress Damages

18 Pursuant to ORS 659A.850, the Commissioner of the Bureau of Labor and
19 Industries has the authority to award money damages for emotional, mental, and
20 physical suffering sustained. *In the Matter of Oregon Truck Painting, LLC*, 37 BOLI 87,
21 114-15 (2018). The commissioner has the authority to fashion a remedy adequate to
22 eliminate the effects of unlawful practices. *Id.*

23
24 In determining the appropriate amount of mental and physical suffering damages,
25 "this forum has long held that Respondents must take Complainants 'as they find

1 them.” *In the Matter of Oregon Truck Painting*, 37 BOLI at 115. A complainant’s
2 testimony, if believed, is sufficient to support a claim for mental suffering damages. *In*
3 *the Matter of Dr. Andrew Engel, DMD, PC*, 32 BOLI at 141.

4 B. Bernabo-Minnick provided compelling testimony that he was devastated by
5 Respondent Lariot’s decision to give him what he believed to be an ultimatum to quit his
6 job. B. Bernabo-Minnick had trouble sleeping and lost almost 20 pounds. B. Bernabo-
7 Minnick was depressed and anxious, and his relationships with his wife and children
8 became strained as a result. B. Bernabo-Minnick and his wife described the difficult
9 financial issues his family experienced that caused him and his wife a good deal of
10 distress during the period following his separation from Lariot.
11

12 The Agency seeks damages on behalf of B. Bernabo-Minnick in the amount of
13 “at least” \$250,000 for emotional, mental and physical suffering. A review of past
14 emotional distress damage awards is instructive when determining an appropriate
15 emotional distress damages award. The forum has made the following emotional
16 distress damages awards in past cases involving OFLA claims.

17 The forum awarded \$20,000 in emotional distress damages where Respondent
18 failed to properly designate Complainant’s absences as family medical leave and
19 counted Complainant’s absences against her under Respondent’s attendance point
20 system. *In the Matter of PCC Structural, Inc.*, 37 BOLI 246 (2020). The forum
21 awarded \$15,000 in emotional distress damages where Respondent denied
22 Complainant OFLA leave by terminating her while she was absent from work for an
23 OFLA qualified health condition. *In the Matter of Income Property Management*, 31
24 BOLI 18 (2010). The forum awarded Complainant \$15,000 in emotional distress
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1 damages where the Respondent failed to restore Complainant to her former position
2 after she took OFLA leave. *In the Matter of Entrada Lodge, Inc.*, 20 BOLI 164 (2000).
3 The forum awarded \$25,000 in emotional distress damages where Respondent allowed
4 Complainant to take only half the OFLA leave to which he was entitled. *In the Matter of*
5 *Maltby Biocontrol, Inc.*, 33 BOLI 121, 159 (2014)

6 The nature of his separation from Lariot and the strain B. Bernabo-Minnick
7 experienced following his separation caused both him and his wife a good deal distress.
8 His family's financial condition was precarious until B. Bernabo-Minnick was able to
9 secure full-time employment with the DOC. While the forum is sympathetic to the
10 struggles experienced by B. Bernabo-Minnick and his family, an award of \$250,000 in
11 emotional distress damages is excessive based on the facts of this case. The evidence
12 of record establishes that the circumstances of this case are similar to those found in
13 *Maltby*. The *Maltby* decision was made over a decade ago. Taking into account
14 inflation and the particular circumstances of this case, the forum therefore concludes
15 that an award of \$40,000 for emotional distress damages is appropriate in this case.
16

17 **OTHER REQUESTED RELIEF**

18 In its Formal Charges, the Agency asked the forum to issue a cease-and-desist
19 order against Respondent, requiring them to immediately stop all of the unlawful
20 employment practices alleged in the Formal Charges. BOLI's Commissioner is
21 authorized to issue an appropriate cease and desist order reasonably calculated to
22 eliminate the effects of any unlawful practice found. ORS 659A.850(4). Among other
23 things, that may include requiring a respondent to:
24

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

1 “(A) Carry out the purposes of this chapter;
2 “(B) Eliminate the effects of the unlawful practice that the respondent is found to
3 have engaged in, including but not limited to paying an award of actual damages
4 suffered by the complainant and complying with injunctive or other equitable
5 relief; and
6 “(C) Protect the rights of the complainant and other persons similarly situated[.]”

7 The forum finds that the Agency’s requested cease and desist order to be
8 appropriate relief in this case. The forum further finds that Respondent Lariot’s owners,
9 managers, supervisors, and human resources personnel should complete annual
10 training for a period of five years, at the expense of Respondent Lariot, on preventing
11 discrimination in the workplace, including OFLA and other protected types of leave. The
12 training must be provided by the Bureau of Labor and Industries’ Employer Assistance
13 Unit, or another trainer agreeable to and approved by the Agency.

14 Exceptions to the Proposed Order

15 The Proposed Order was issued on July 10, 2024. The Agency and
16 Respondent’s counsel timely filed their exceptions to the Proposed Order. The
17 Agency’s exceptions request that the forum make corrections to scrivener’s errors. The
18 forum concludes that those exceptions are well taken and those exceptions are granted,
19 as reflected in the revisions to the sections above.

20 The ALJ entered default against Respondent in an interim order dated January
21 31, 2024. (See Finding of Fact – Procedural #18). OAR 839-050-0330(3) provides that,
22 upon an entry of default,

23 “The Administrative Law Judge will not permit the defaulted party to
24 participate in any manner in the hearing, including, but not limited to,
25 presentation of witnesses or evidence on the party’s own behalf,
 examination of Agency witnesses, objection to evidence presented by the
 Agency, making of motions or argument, or filing exceptions to the
 Proposed Order.”

1 However, the ALJ allowed Respondent to file its exceptions to the proposed order
2 due to Respondent's arguments regarding the ALJ's interim order entering default
3 against the Respondent and subsequent refusal to relieve Respondent of the default.
4 Respondent argues that the proposed order should be set aside and a new hearing
5 granted. The forum will address the Respondent's arguments regarding the ALJ's entry
6 of default and denial of the Respondent's request for relief from default.
7

8 OAR 839-050-0030(1), provides:

9 "Except as otherwise provided in ORS 652.332 (Administrative proceeding
10 for wage claim collection) (1) the charging document will be served on the
11 party or the party's representative by personal service or by United States
12 Postal Service registered or certified mail. Service of a charging document
13 is complete upon the earlier of:

- 14 (a) Receipt by the party or the party's representative; or
15 (b) Mailing when sent by United States Postal Service
16 registered or certified mail to the correct address of the party or the
17 party's representative."
18

19 Respondent contends that it did not receive the Notice of Hearing and associated
20 charging documents mailed to Barry Thiriot, an authorized representative of the
21 Respondent, at his last known addresses in Klamath Falls, Oregon, and Medford,
22 Oregon. Respondent notes that the mailings sent to Respondent by the Agency were
23 returned as undeliverable.
24

25 However, the Agency also served the Notice of Hearing and associated charging
26 documents to the Oregon Secretary of State, who was appointed as Respondent's
27 registered agent for service of process pursuant to the Withdrawal of Authority to
28 Transact Business filed with the Oregon Secretary of State's Office on February 6,
29 2023. Service was perfected as required under OAR 839-050-0030(1)(a).

1 Respondent contends that, because service did not comply with ORS 60.121(3),
2 that default was improperly entered. ORS 60.121(3) provides:

3 "Service shall be made on the Secretary of State by:

4 (a) Serving the Secretary of State or a clerk on duty at the office a copy of the
5 process, notice or demand, with any papers required by law to be delivered in
6 connection with the service, and the required fee for each party being served or
by mailing to the office a copy of the process, notice or demand and the required
fee for each party being served by certified or registered mail;

7 (b) Transmittal by the person instituting the proceedings of notice of the
8 service on the Secretary of State and copy of the process, notice or demand and
9 accompanying papers to the corporation being served by certified or registered
mail:

10 (A) At the last registered office of the corporation as shown by the
records on file in the office of the Secretary of State; and

11 (B) At such address the use of which the person initiating the
12 proceedings knows or, on the basis of reasonable inquiry, has reason to
believe is most likely to result in actual notice; and

13 (c) Filing with the appropriate court or other body, as part of the return of
14 service, the return receipt of mailing and an affidavit of the person initiating the
proceedings stating that this section has been complied with."

15 The Agency transmitted the Notice of Hearing and associated charging
16 documents to the last registered office of the corporation as shown by the records on
17 file in the office of Secretary of State and at addresses the Agency had reason to
18 believe was the most likely to result in actual notice. Indeed, as demonstrated by
19 Respondent's presence at the hearing, actual notice was accomplished contrary to
20 Respondent's arguments in its exceptions to the proposed order. The Agency met the
21 requirements of ORS 60.121(3). As such, service upon the Respondent was perfected
22 when the documents were received by its agent, the Oregon Secretary of State.
23 Respondent's failure to abide by ORS 65.734(1), which requires the foreign corporation
24 to maintain a proper mailing address with the Oregon Secretary of State for a period of
25

1 five years following the withdrawal does not constitute "good cause for the party's
2 inaction that caused the default." OAR 839-050-0340(2).

3 The arguments offered in Respondent's exceptions do not address how Patzke
4 came to be aware of the proceedings approximately two weeks prior to the scheduled
5 hearing or how she came to leave a voicemail message for the ALJ on behalf of
6 Respondent. Similarly, Respondent's arguments do not address why Respondent had
7 no contact with the Agency during that two-week period or made any effort to submit the
8 documents Patzke indicated she was assembling for hearing.

9
10 Respondent has not shown that the default was improperly entered; nor has the
11 Respondent shown that relief from that default was timely sought under OAR 839-050-
12 0340. The default entered against the Respondent remains. As such, the forum will not
13 address Respondent's remaining exceptions. See OAR 839-050-0330(3).

14 ORDER

15 A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS
16 659A.850(4), and to eliminate the effects of the violations of ORS 659A.171(1); ORS
17 659A.183(1),(2); OAR 839-009-0270(1); and OAR 839-009-0320(3) by Respondent
18 **Lariot Corporation** and as payment of the damages awarded, the Commissioner of the
19 Bureau of Labor and Industries hereby orders Respondent **Lariot Corporation** to
20 deliver to the Administrative Prosecution Unit of the Bureau of Labor and Industries,
21 1800 SW First Avenue, Suite 500, Portland, OR 97201, a certified check payable to the
22 Bureau of Labor and Industries in trust for **Brise Bernabo-Minnick** in the amount of:

23
24 1) FORTY THOUSAND DOLLARS (\$40,000), representing
25 compensatory damages for emotional and physical suffering experienced by
Complainant as a result of Respondent's unlawful employment practices found
herein; plus,

2) SEVENTY-FIVE THOUSAND ONE HUNDRED FIFTY-TWO DOLLARS (\$75,152), representing wages lost as a result of Respondent's unlawful employment practices; *plus*

3) Interest at the legal rate on the sum of ONE HUNDRED FIFTEENTHOUSAND ONE HUNDRED FIFTY-TWO DOLLARS (\$115,152), until paid.

B. NOW, THEREFORE, as authorized by ORS 659A.850, and to eliminate the effects of violations of ORS 659A.142(4) by Respondent **Lariot Corporation** the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Lariot Corporation** to:

1) At Respondent's expense, Respondent's owners, managers, supervisors, and human resources personnel shall complete annual training for a period of five years on preventing discrimination in the workplace, including OFLA and other protected types of leave. The first training shall be completed within 90 days of the date of the Final Order issued in this case and Respondent shall provide proof of completion of each training to the Bureau within 30 days of completing each year's training.

2) To create and implement a policy addressing OFLA and other types of protected leave that accurately reflects Oregon law, to be approved by the Bureau of Labor and Industries, Civil Rights Division. If such a policy is in place, the Respondent shall provide a copy of that policy to the Bureau of Labor and Industries, Civil Rights Division, to ensure the policy conforms with Oregon law.

3) Cease and desist from violating laws pertaining to unlawful discrimination against persons taking protected leave in the scope of the operation of Lariot Corporation.



Christina Stephenson, Commissioner
Bureau of Labor and Industries

Issued on: January 28, 2025