

BRAD AVAKIAN
COMMISSIONER



CHRISTIE HAMMOND
DEPUTY COMMISSIONER

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

**BLUE GRYPHON, LLC and FLORA
TURNBULL, individually as aider
and abettor under ORS
659A.030(1)(g),**

Respondents.

Case No. 20-15

FINDINGS OF FACT
CONCLUSIONS OF LAW
OPINION
ORDER

SYNOPSIS

Complainant was suspended and discharged because he reported that Blue Gryphon, the adult foster care home that employed him, had an inadequate food supply for its residents. The forum awarded Complainant \$1,620 in back pay and \$20,000 for his emotional and mental suffering. The forum also required Respondent Turnbull, Blue Gryphon's manager and sole member, to undergo approved training on Oregon's whistleblower laws.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries ("BOLI") for the State of Oregon. The hearing was held on September 22-23, 2015, at BOLI's Eugene office, located at 1400 Executive Parkway, Eugene, Oregon.

The Agency was represented by Administrative Prosecutor Cristin Casey, an employee of the Agency. Lewis Garchow ("Complainant") was present throughout the hearing and was not represented by counsel. Respondents were represented by Marianne Dugan, attorney at law. Respondent Turnbull was present throughout the hearing.

1 The Agency called Complainant; Matthew Butler, Senior Investigator, BOLI Civil
2 Rights Division; and Katie Haynes as witnesses. Respondents called Flora Turnbull as
3 their only witness.

4 The forum received into evidence:

- 5 a) Administrative exhibits X1 through X26, X28, X29, and X31 through X33;
- 6 b) Agency exhibits A1 through A16, A18,¹ and A20 through A22.

7 Having fully considered the entire record in this matter, I, Brad Avakian,
8 Commissioner of the Bureau of Labor and Industries, hereby make the following
9 Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact,² Conclusions
10 of Law, Opinion, and Order.

11 **FINDINGS OF FACT – PROCEDURAL**

12 1) On May 28, 2013, Complainant filed a verified complaint with the Agency's
13 Civil Rights Division alleging that he was the victim of the unlawful employment
14 practices of Respondent Blue Gryphon LLC. On August 21, 2013, the complaint was
15 amended to name Respondent Flora Sacha Turnbull as an aider and abettor. On May
16 12, 2014, the complaint was amended a second time to include the citation of ORS
17 659A.030(1)(g). After investigation, the Agency issued a Notice of Substantial Evidence
18 Determination on May 28, 2014, in which it found substantial evidence that Respondent
19 Blue Gryphon had engaged in unlawful employment practices in violation of ORS
20 659A.199, ORS 659A.230, and ORS 659A.233, and that Respondent Turnbull violated
21 ORS 659A.030(1)(g) by aiding, abetting, inciting, compelling, or coercing Blue
22 Gryphon's violations. (Exs. A1, A4, A5, A22)

23 _____
24 ¹ Exhibit A18 is a single-spaced, typed statement by Katie Haynes that is two pages long. The entire
document was received except for the last 3 paragraphs on the 2nd page.

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

1 2) On December 16, 2014, the forum issued a Notice of Hearing to
2 Respondents, the Agency, and Complainant stating the time and place of the hearing as
3 March 31, 2015, beginning at 9:00 a.m., at BOLI's Eugene office. Together with the
4 Notice of Hearing, the forum sent a copy of the Agency's Formal Charges ("Charges"), a
5 document entitled "Summary of Contested Case Rights and Procedures" containing the
6 information required by ORS 183.413, a document entitled "Servicemembers Civil Relief
7 Act (SCRA) Notification, a multi-language notice explaining the significance of the
8 Notice of Hearing, and a copy of the forum's contested case hearings rules, OAR 839-
9 050-000 to 839-050-0445. (Ex. X2)

10 3) Summarized, the Agency's Charges alleged that Respondents
11 suspended, then fired Complainant, an employee of Blue Gryphon, because he made a
12 good faith complaint of a food shortage at Blue Gryphon that he believed was evidence
13 of a violation of a state or federal law, rule or regulation, in violation of ORS 659A.199
14 and OAR 839-010-0100(1). The Charges requested damages for physical, mental and
15 emotional distress in an amount "estimated to be at least \$30,000," lost wages
16 estimated to be at least \$42,640, and that Respondent Turnbull be trained, at her
17 expense, on the correct interpretation and application of Oregon laws pertaining
18 whistleblowing. (Ex. X2)

19 4) On December 31, 2014, the ALJ granted Respondents' request for a 10
20 day extension to file an answer to the Charges. On January 13, 2015, Respondent
21 Turnbull filed a letter stating that she had been the sole member of Blue Gryphon LLC
22 and would act as the authorized representative in this case. On the same day,
23 Respondent Turnbull filed a request for a second extension until January 23, 2015, to
24 file an answer. The Agency did not object and the ALJ granted the motion. (Exs. X4,
25 X6, X7)

1 5) On January 22, 2015, Respondents, through Turnbull, filed an answer in
2 which they denied engaging in the unlawful employment practices alleged in the
3 Charges. (Ex. X8)

4 6) On January 26, 2015, the ALJ issued two interim orders. The first, entitled
5 "Requirements for Filing Motions and Other Documents," explained the Forum's filing
6 requirements, including the method by which documents must be filed and the timeline
7 for filing documents. The second order required case summaries to be filed no later
8 than March 17, 2015, and set out the requirements for what each participant must
9 include in their case summary. (Exs. X9, X10)

10 7) On February 27, 2015, the Agency filed a motion for a protective order
11 covering the first 162 pages of a Protective Services report issued by Lane County
12 Mental Health. On March 5, 2015, the ALJ issued a protective order covering those
13 documents. (Exs X11, X12)

14 8) On March 13, 2015, attorney Marianne Dugan notified the forum that she
15 would be representing Respondents. Simultaneously, Dugan moved for a
16 postponement of the hearing based on pre-existing conflicts in her schedule. The
17 Agency did not object, and on March 23, 2015, ALJ granted Respondents' motion.
18 (Exs. X13 through X16, X18)

19 9) On April 6, 2015, the ALJ issued an interim order resetting the hearing to
20 begin on September 22, 2015, at 9:00 a.m. In the same order, the ALJ changed the
21 due date for case summaries to September 7, 2015. On June 15, 2015, the ALJ
22 changed the case summary due date to September 8, 2015, in recognition that
23 September 7 was Labor Day, a legal holiday. (Exs. X19, X20)

24 10) On September 8, 2015, the Agency moved for a second protective order
25 covering the remaining 174 pages of the draft Protective Services report issued by Lane

1 County Mental Health. On September 9, 2015, the ALJ granted the Agency's motion
2 and issued a second protective order. (Exs. X22, X24)

3 11) On September 8, 2015, the Agency filed its case summary, including 22
4 exhibits. (Ex. X23)

5 12) On September 9, 2015, Respondents sent a copy of its case summary to
6 the forum via e-mail. (Ex. X27b)

7 13) On September 11, 2015, the Agency filed a motion to exclude
8 Respondents' case summary in its entirety and to prohibit Respondents from calling
9 witnesses listed in its case summary at hearing. (Ex. X25)

10 14) On September 14, 2015, the ALJ issued an interim order entitled "Timeline
11 for Respondents to Respond to Agency's Motion to Exclude" in which the ALJ stated
12 that Respondents' response, should they choose to file one, must be filed no later than
13 5 p.m. on September 16, 2015. The order required Respondents to e-mail a courtesy
14 copy of the response to the ALJ and Ms. Casey by the same deadline. The ALJ sent
15 the order to Respondents' attorney by first-class mail and e-mail. (Ex. X26)

16 15) On September 14, 2015, BOLI's contested case coordinator received a
17 hard copy of Respondents' case summary that was postmarked on September 12,
18 2015. (Ex. X27)

19 16) On September 17, 2015, the Agency filed a renewed motion to exclude
20 Respondents' case summary in its entirety. That same day, Respondents filed a
21 response to the Agency's motion and a supplemental case summary in an envelope
22 bearing a postmark dated September 17, 2015. (Ex. X30)

23 17) On September 18, 2015, ALJ issued an interim order granting the
24 Agency's motion to exclude Respondents' case summary and to prohibit Respondents
25 from calling witnesses listed in their case summary. That order is reprinted below:

1 "On September 11, 2015, the Agency filed a motion to exclude evidence
2 submitted in Respondents' 'untimely filed case summary' and to refuse to allow
3 witnesses listed in Respondents' case summary to testify on Respondents'
4 behalf. On September 14, 2015, I issued an interim order in response to the
5 Agency's motion that included the following language:

6 'Due to the short time remaining before hearing, Respondents' response,
7 should they choose to file one, must be filed no later than later than 5 p.m.
8 on September 16, 2015. In addition to hand-delivering or mailing a
9 response by that time, Respondents are also ordered to send a courtesy
10 copy of their response by email to me and Ms. Casey no later than 5 p.m.
11 on September 16, 2015.'

12 My interim order was mailed to Respondents' counsel on September 14, 2015,
13 and e-mailed to Respondents' counsel at 11:39 a.m. that same day.

14 "In response, Respondents' counsel e-mailed a response to the Agency's
15 motion to exclude at 9:33 p.m. on September 16, 2015, that also included a
16 supplemental case summary. Respondents' response was not hand-delivered
17 on September 16, 2015. As Respondents' counsel attached no certificate of
18 service to her response and BOLI's contested case coordinator had not received
19 Respondents' response by the time I issued this order, I have no way of knowing
20 at this time if her response was postmarked on September 16, 2015.

21 "On September 17, 2015, the Agency filed a renewed motion to exclude in
22 response to Respondents' September 16 e-mail, asking the forum to disregard
23 Respondents' response because it was untimely.

24 "ANALYSIS

25 "On March 23, 2015, I issued an amended interim order requiring case
summaries to be filed. My order was mailed to Cristin Casey, the Agency's
administrative prosecutor, and Marianne Dugan, Respondents' counsel. The first
paragraph of that order was printed in bold and read as follows:

**'IMPORTANT: Your Case Summary must be filed no later than
Friday, April 10, 2015. Your case summary is filed when it is
postmarked or hand-delivered to the Bureau's address printed on the
first page of the Notice of Hearing. If you do not file a case summary,
you may not be able to call witnesses or present evidence at the
contested case hearing.'**

The second to last paragraph in the order, also printed in bold, read as follows:

1 "The administrative law judge may refuse to admit evidence that has
2 not been disclosed in response to this order unless (a) the
3 participant that failed to provide the evidence offers a satisfactory
4 reason for having failed to do so, or (b) excluding the evidence
5 would violate the duty to conduct a full and fair inquiry under ORS
6 183.417(8). If the administrative law judge admits evidence not
7 provided in response to this order, the administrative law judge may
8 grant a continuance to allow an opportunity for the other participants
9 to respond.'

6 "On April 6, 2015, I issued an interim order resetting the hearing to
7 September 22, 2015, and changing the case summary due date to September 7,
8 2015. On June 15, 2015, I issued an interim order changing the case summary
9 due date to Tuesday, September 8, 2015, in recognition of the fact that
10 September 7 is a holiday.

9 "On September 4, 2015, I conducted a brief telephonic prehearing
10 conference with Ms. Casey and Ms. Dugan at 2 p.m., during which I reaffirmed
11 that case summaries were due on September 8, 2015.

11 "The Agency hand-delivered its case summary to BOLI's contested case
12 coordinator on September 8, 2015, and mailed it on the same date to Ms. Dugan.

13 "On September 9, 2015, at 9:23 a.m., Ms. Dugan sent an e-mail to myself,
14 BOLI ALJ Furnanz, and Ms. Casey in which she stated: 'I wanted to let you and
15 opposing counsel know that I was delayed in completing the case statement
16 which was due yesterday but will send via e-mail by end of day.' At 9:07 p.m.
17 that evening, Ms. Dugan e-mailed a copy of Respondents' case summary to me,
18 ALJ Furnanz, Ms. Casey, and BOLI's contested case coordinator. The case
19 summary listed eight witnesses and was unaccompanied by any exhibits.

17 "On September 11, 2015, the Agency filed its motion to exclude evidence
18 submitted in Respondents' 'untimely filed case summary' and further requested
19 that witnesses listed in Respondents' case summary not be allowed to testify. In
20 support of its motion, the Agency argued that:

- 20 • Respondents' case summary had not been timely filed;
- 21 • The statement by Respondents' counsel that she was 'delayed' in filing
22 Respondents' case summary did not constitute a 'satisfactory' reason;
- 23 • Respondents' counsel did not request an extension of time to file a
24 case summary;
- 25 • The Agency would be prejudiced if Respondents' witnesses were
allowed to testify. In support of this argument, the Agency provided
documentary evidence that (a) on March 25, 2015, it sent a written
informal discovery request to Respondents' counsel asking for '[t]he
names, addresses, phone numbers and dates of employment for all

1 employees working for Blue Gryphon, LLC from May 2011 through
2 April 2013'; and (b) that the only response received by the Agency was
3 Respondent Flora Turnbull's April 20, 2015, statement 'I am afraid I
4 have not been able to locate any of the information requested at this
5 time.' Respondents' supplemental case summary that was e-mailed to
6 the forum at 9:33 p.m. on September 16, 2015, confirms that most or
7 all of the witnesses listed on Respondents' case summary were former
8 employees and coworkers of Complainant.

9 "On September 14, 2015, BOLI's contested case coordinator received
10 Respondents' case summary in an envelope that was postmarked September 12,
11 2015, and apparently mailed by Respondent Flora Turnbull, as her name and
12 return address are handwritten on the envelope. This was the same case
13 summary that was e-mailed by Respondents' counsel on September 9, 2015.

14 "As noted earlier, Respondent's counsel did not e-mail a response to the
15 Agency's motion to exclude until 9:33 p.m. on September 16, 2015, four and one-
16 half hours after it was due pursuant to my September 14, 2015, interim order.

17 "In Respondents' response to the Agency's motion to exclude, they argue
18 the following:

19 'There is no prejudice to the agency. Because respondents' counsel sent
20 the case summary via e-mail it was actually received by the agency before
21 respondents' counsel received the agency's case summary, which was
22 only sent by mail. As with any procedure as opposed to jurisdictional rule
23 that should end the inquiry.

24 'Excluding evidence would violate the duty to conduct a full and fair inquiry
25 under ORS 183.417(8), because the witnesses listed by respondents have
information that presents an independent picture of the circumstances and
facts that are being presented by the agency.

* * * * *

'As to the reason for the delay, that falls on counsel's shoulders and
should not be used to punish the Respondents. Counsel's primary
practice is in federal court, where electronic filing and service are now the
norm. Counsel was preparing to leave the state for one-week trip (leaving
the morning of September 9 and returning late today, September 16), and
unfortunately did not make note of the mailing/postmark requirements until
after leaving town. As noted above, because the case summary was e-
mailed to the agency and the ALJ, it was received by those entities before
undersigned counsel received the agency's case summary. The purpose
of the timeliness requirement therefore should be deemed to have been
met, and the witnesses should be allowed.'

1 Respondents' response does not address the Agency's argument that the
2 Agency will be prejudiced by the fact that, almost six months ago, it requested
3 the identity and contact information for the persons whom Respondents now
4 propose to call as witnesses and was told that Respondents were unable to
5 locate any of that information.

6 "The forum considers the Agency's motion and Respondents' response in
7 light of OAR 839-050-0210(5), which provides:

8 'The administrative law judge may refuse to admit evidence that is not
9 been disclosed in response to a case summary order, unless the
10 participant failed to provide the evidence offers a satisfactory reason for
11 having failed to do so or unless excluding the evidence would violate the
12 duty to conduct a full and fair inquiry under ORS 183.417 (8). If the
13 administrative law judge admits evidence not provided in response to a
14 case summary order, the administrative law judge may grant a
15 continuance to allow opportunity for the other participants to respond.'

16 "Respondents' arguments fail for the reasons set out below.

17 "As an initial matter, Respondents' response to the Agency's motion to
18 exclude is untimely. It was filed late and no extension was requested. Even if it
19 had been timely filed, it would fail because of the reasons discussed below.

20 "The forum's filing requirements were prominently and explicitly spelled
21 out to Respondents and the Agency in a series of interim orders. A copy of the
22 forum's contested case rules, including OAR 839-050-0210(5), was also served
23 on Respondents with the Notice of Hearing. The failure of Respondents' counsel
24 to notice the forum's 'mailing/postmark requirements' before leaving town and the
25 fact that her primary practice is in federal court, where filing requirements differ,
is not a 'satisfactory' reason under OAR 839-050-0210(5) for not familiarizing
herself with the forum's requirements and meeting those requirements,
particularly when they were prominently set out in the very order requiring the
filing of case summaries. OAR 839-050-0050(1) explicitly states that 'the [ALJ]
may disregard any document that is filed with the Forum beyond the established
number of days for filing,' while OAR 839-050-0050(2) sets out the procedure for
requesting an extension of time for filing a document and gives the ALJ discretion
to permit a participant to make an oral motion for an extension of time. Knowing
her travel schedule, Respondents' counsel could have made an oral motion for
an extension of time to file Respondents' case summary during the prehearing
conference on September 4 or even as late as September 8. In conclusion,
while unfortunate for Respondents because they must bear the brunt, that
consequence does not make counsel's failure to familiarize herself with and meet
the forum's procedural rules a 'satisfactory' reason.

1 "The forum's obligation set out in ORS 183.417(8) to conduct a 'full and
2 fair inquiry' does not extend to requiring the forum to ignore its own procedural
3 rules. One reason for those rules, including filing deadlines, is to ensure that the
4 'full and fair' requirement of ORS 183.417(8) is met. Also, the 'full and fair'
5 provision in ORS 183.417(8) requires the forum to apply that concept equally to
6 Respondents and the Agency. In their case summary, Respondents propose to
7 call eight witnesses whose identities were not disclosed to the Agency until
8 September 9, 2015, on the grounds that Respondents did not have that
9 information, despite the Agency's written request to Respondents' counsel for
10 that information on March 25, 2015. Respondents' counsel has provided no
11 explanation whatsoever for this failure. Respondents argue that they should be
12 allowed to call these witnesses because they 'have information that presents an
13 independent picture of the circumstances and facts that are being presented by
14 the agency,' thereby implying that a 'full' hearing cannot be held without that the
15 testimony of those witnesses. However, the word 'full,' as used in ORS
16 183.417(8), does not give all participants the absolute right, regardless of any
17 other procedural rules in place to insure fairness, to present every bit of evidence
18 that is in any way relevant to the issues in a case. If so, an ALJ in a contested
19 case proceeding could never exclude any proffered evidence that was in any way
20 relevant to a case. Under these circumstances, when Respondents are
21 represented by counsel, when informal discovery directly related to the case
22 summary was requested by the Agency and withheld until the case summary
23 was filed, and when forum's filing requirements were prominently and explicitly
24 stated in the forum's order requiring case summaries, I find that allowing these
25 eight witnesses to testify would be manifestly unfair and prejudicial to the
Agency, that granting a continuance and further delaying the hearing will not cure
the problem, and that granting the Agency's motion does not contravene the 'full
and fair' requirement in ORS 183.417(8).

"In conclusion, the Agency's motion is **GRANTED**. None of the witnesses
listed in Respondents' case summary will be allowed to testify unless their
testimony is solely for the purpose of impeachment."

(Ex. X29)

18) At the start of the hearing, the ALJ orally advised the Agency and
Respondents of the issues to be addressed, the matters to be proved, and the
procedures governing the conduct of the hearing. (Statement of ALJ)

19) At the conclusion of Respondents' case-in-chief, Respondents filed a
written motion to dismiss, which the ALJ denied. (Ex. X32; Statement of ALJ)

20) During the hearing, the ALJ took judicial notice of OAR 309-040-0385 and
OAR 411, Division 50, as renumbered.

1 2) Respondent Turnbull registered Blue Gryphon with the Oregon Secretary
2 of State Corporation Division in March 2010 in response to Lane County's request to set
3 up a foster home for individuals who, because of the severity and nature of their mental
4 health, could not be cared for at any other foster home in Lane County at the time.
5 Lane County contracted with Blue Gryphon to pay a set amount for each resident. Blue
6 Gryphon's profit, if any, was the amount left over from Lane County's contract payments
7 each month, less expenses. (Testimony of Turnbull)

8 3) Blue Gryphon commenced operations in March 2010. It continued to
9 operate until April 22, 2013, when Lane County stopped funding Blue Gryphon and
10 transferred its residents to other facilities. Throughout its existence, Blue Gryphon
11 housed five residents, the maximum number permitted in adult foster homes by Oregon
12 law. (Testimony of Turnbull; Ex. A12)

13 4) Acting on the advice of her accountant, Turnbull used her personal
14 checking and credit accounts to manage Blue Gryphon's finances, receiving all
15 payments from Lane County into her personal accounts and paying all of Blue
16 Gryphon's expenses from her personal accounts. (Testimony of Complainant, Turnbull)

17 5) In or around May 2011, Turnbull hired Complainant, who had previously
18 worked as a caregiver, to be a full-time care provider and provide direct care support for
19 Blue Gryphon's residents. Complainant was initially paid \$11 per hour. (Testimony of
20 Complainant, Turnbull)

21 6) At some point in 2012, Complainant was promoted to assistant manager
22 and given a raise to \$15 per hour. (Testimony of Complainant, Turnbull)

23 7) Up to January 2013, Complainant was assistant manager at Blue
24 Gryphon. At that time, Anthony Culver, Turnbull's "fiancé/partner," returned to work and
25 assumed some of Complainant's duties. Complainant's pay was reduced to \$12 per

1 hour. From January 2013 until Turnbull's vacation in March 2013, Complainant worked
2 as Blue Gryphon's medical appointments coordinator. During this time, his regular work
3 schedule was 8 a.m. to 5 p.m., Sunday through Thursday. (Testimony of Complainant,
4 Turnbull)

5 8) Complainant worked approximately 45 hours per week³ throughout his
6 employment with Blue Gryphon. (Testimony of Complainant)

7 9) One of Blue Gryphon's responsibilities was to provide meals and food for
8 its five residential clients. Blue Gryphon planned meal menus a week in advance and
9 provided three meals a day, plus snacks. Before 2013, Turnbull set Blue Gryphon's
10 monthly food budget at \$1200. In 2013, she reset it to \$800 a month and instituted a
11 new practice of having Blue Gryphon's staff make a bulk purchase of food at Costco
12 once a month and make weekly shopping trips for perishable foods and other items of
13 food that had been eaten by residents and were needed. In part, the new practice was
14 to address the problem that had arisen with staff randomly buying food while food
15 already purchased went bad. (Testimony of Complainant, Turnbull)

16 10) Blue Gryphon's residents were able to snack on food from the kitchen
17 during the day, usually accompanied by staff to keep residents from gorging
18 themselves.⁴ (Testimony of Turnbull)

19 11) Turnbull gave Complainant and three other Blue Gryphon employees a
20 credit/debit card to be used for purchasing food for Blue Gryphon's residents. In
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22

23 ³ Complainant testified that he worked 8 a.m. – 5 p.m., five days a week, for a total of 45 hours a week.
24 Respondents offered no evidence to show that Complainant was given a meal break or that he did not
work 45 hours per week. Consequently, the forum has relied on Complainant's testimony as to the total
hours he worked per week.

25 ⁴ Turnbull testified that there were times when an unaccompanied resident had gone into the kitchen and
eaten a package of meat that weighed as such as several pounds.

1 addition, Turnbull gave Complainant the authority to do billing, sign and deposit checks.

2 (Testimony of Complainant, Turnbull)

3 12) In the last week of March 2013, Turnbull decided to go on vacation with
4 Culver to California for a week and asked Complainant to work as interim manager in
5 their absence. Turnbull raised Complainant's pay to \$15 per hour while she was gone.

6 (Testimony of Complainant, Turnbull)

7 13) Before Turnbull left for vacation on March 23 or 24,⁵ she and Culver
8 inspected Blue Gryphon's cupboards and refrigerators and determined that the food
9 supply was adequate for the time they would be gone. Turnbull also arranged with Gina
10 Armijo, Complainant's coworker, to make her regular weekly shopping trip for
11 perishables on Monday, March 25. Apart from Armijo's expected shopping trip, Turnbull
12 asked Complainant not to spend more than \$20 on food while she was gone.

13 (Testimony of Turnbull)

14 14) On March 28, 2013, while Turnbull was still on vacation, Armijo, who was
15 making lunch for Blue Gryphon's residents, told Complainant that there was no food at
16 Blue Gryphon with which to make lunch. Complainant was aware that administrative
17 rules governing Oregon foster care homes require that foster homes have sufficient
18 food to feed their residents. As interim manager, he believed it was his responsibility to
19 ensure that Blue Gryphon's residents had sufficient food to eat. Accordingly, he
20 instructed Armijo to go to the store and buy food for lunch. Armijo did this, spending
21 between \$20 and \$30 to purchase enough food for lunch, dinner, "and some extras."
22 Prior to this time, Blue Gryphon had never run out of food during Complainant's
23 employment. (Testimony of Complainant)

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⁵ Turnbull testified that she left for vacation on the "weekend" and returned on March 30.

1 15) After Armijo bought the food, she told Complainant that Turnbull had
2 called her and was "pretty upset" that she had spent the money. (Testimony of
3 Complainant)

4 16) Between March 28 and March 30, 2013, Complainant and Turnbull
5 exchanged the following text messages:

6 **March 28, 5:51 p.m. (Turnbull→Complainant):** "Someone spent a bunch of
7 money today, almost 30, I don't have that. I had said don't spend more than 20
8 this week and that already happened. More than 30. We're barely making it
here. Who's doing that? "

9 **March 28, 6:31 p.m. (Complainant→Turnbull):** "I'm sorry that Gina over spent.
The house needed food. I don't know what else to say Flora."

10 **March 29, 8:27 a.m. (Turnbull→Complainant):** "ABSOLUTELY NO MORE
11 SPENDING AT ALL UNTIL I GET BACK. FROM NOW ON ANY SPENDING
12 WILL NEED TO BE PRE-AUTHORIZED BY ME EVERY TIME. IF THERE IS
13 ANY PETTY CASH IT SHOULD BE DEPOSITED IN BANK IMMEDIATELY.
Eddie⁶ knows he needs to buy his own lunch anyway, as do staff. I need that
check to be dropped off today. Please let me know when you do that."

14 **March 29, 8:31 a.m. (Complainant→Turnbull):** "Understood."

15 **March 29, 8:42 a.m. (Turnbull→Complainant):** "Is there any petty cash?"

16 **March 29, 8:59 a.m. (Complainant→Turnbull):** "There is \$16.37 that I will
17 deposit when Raquel comes on shift."

18 **March 29, 9:03 a.m. (Turnbull→Complainant):** "Cool, thanks. Now we get to eat
today."

19 **March 30, 7:32 a.m. (Complainant→Turnbull):** "Yes I did the receipt in on your
20 desk."

21 (Testimony of Complainant, Turnbull; Ex. A16)

22 17) When Turnbull texted Complainant on March 29 to say "absolutely no
23 more spending," she did so because it seemed to her that "things were really out of
24 control again" relative to grocery spending and she was very concerned because there

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⁶ "Eddie" was one of Blue Gryphon's residents.

1 had already been five grocery purchases during her vacation that she hadn't known
2 about, including two purchases totaling \$30 on March 28. At that time, Turnbull was
3 feeling financially stressed because the room tax on the hotel she was staying in during
4 her vacation was considerably more than she had expected and she was concerned
5 about her checking account being "overdrafted." (Testimony of Turnbull)

6 18) On March 29, Complainant decided he no longer wanted any
7 responsibility for Turnbull's credit card and cut it up into small pieces, putting the pieces
8 in Turnbull's desk drawer. (Testimony of Complainant)

9 19) Katie Haynes is a nurse who has a contract through the State of Oregon
10 with their long-term care nursing program to service senior and disabled clients upon
11 referral from caseworkers. In early 2013, one of Haynes's diabetic clients lived at Blue
12 Gryphon. Haynes visited that client at least once a month. On March 29, 2013, Haynes
13 visited Blue Gryphon and talked with Complainant, who was "quite upset" and told her
14 his concern that there wasn't enough food for the weekend. Haynes reminded
15 Complainant that he was a "mandatory reporter" and that what he described to her was
16 "neglect." Haynes inspected Respondent's refrigerator and saw there were only a
17 couple packs of chicken, four cups of milk, and no fresh fruit or vegetables. She did not
18 check in the cupboards for non-perishables. Complainant and Haynes agreed that, as
19 mandatory reporters, they needed to report the food shortage. After she left Blue
20 Gryphon, Haynes began making phone calls to agencies, including Lane County
21 Protective Services, who referred her to the State of Oregon. Haynes then called
22 several state agencies, eventually made a report "to some state agency," and requested
23 an immediate inspection because she believed there was not enough food at Blue
24 Gryphon for the weekend. (Testimony of Haynes)

1 20) On March 29, Complainant also called Lane County Protective Services
2 and reported that there was not enough food at Blue Gryphon for its residents.
3 (Testimony of Complainant; Ex. A1)

4 21) On March 31, 2013, Turnbull, who was upset that Complainant had
5 discussed a food shortage with staff but not told her there was a current need for food,
6 phoned Complainant and asked Complainant for an explanation of why he spent the
7 money on food. Complainant responded that it was because they needed food for the
8 house. Turnbull asked repeatedly "Why would you do this?" and Complainant
9 repeatedly answered "because we needed food in the house." Turnbull became upset
10 and began yelling; Complainant also got upset and hung up. Turnbull called back
11 immediately and asked the same question again and Complainant hung up again.
12 During their conversation, Complainant did not tell Turnbull that the house "still" needed
13 food. Following their conversation, Turnbull sent the following text message to
14 Complainant at 4:04 p.m.:

15 "It is not healthy for the residents to have a staff there with such a negative
16 attitude and making such questionable judgment calls, especially when refusing
17 to even explain the reasoning behind your choices. So consider yourself
suspended for now and we'll have to talk about where to go from there."

18 (Testimony of Complainant, Turnbull; Ex. A16)

19 22) After receiving Turnbull's text message on March 31, Complainant left his
20 work keys in Respondent's staff house, gathered his belongings, and left. He never
21 returned to work after March 31. Had Complainant continued work after March 31, he
22 would have returned to his job of medical appointments coordinator. (Testimony of
23 Complainant, Testimony of Butler; Ex. A14)

1 23) While Turnbull was on vacation, no one told her that there was a "current"
2 lack of food. During Turnbull's vacation, there were no days in which a Blue Gryphon
3 resident missed a meal. (Testimony of Turnbull)

4 24) On April 4, 2013, Karen Howell, Lane County Protective Services
5 investigator for mental health programs, called Turnbull and told her that there would be
6 an investigation. Turnbull's first thought was that Complainant had made a complaint in
7 retaliation for being suspended. Later that day, Howell visited Turnbull at Blue Gryphon.
8 During her visit, Howell told Turnbull that an "outside" person, not a staff person or a
9 resident, had made a complaint, and that the main complaint was not having enough
10 food in the house. (Testimony of Turnbull, Butler; Ex. A15)

11 25) On April 4, 2013, Complainant and Turnbull exchanged the following text
12 messages:

13 **April 4, 4:38 p.m. (Turnbull→Complainant):** "If you have any keys or anything
14 else belonging to the house, you need to return them immediately. You are not
15 welcome on the premises yourself. Give whatever you have to another employee
to return."

16 **April 4, 4:40 p.m. (Complainant→Turnbull):** "I left all the keys I had at the
house. I expect my check to be mailed tomorrow."

17 **April 4, 4:45 p.m. (Turnbull→Complainant):** "I don't know where these keys are.
18 You are still suspended unless you want to resign, either way at this point you
will not be paid until regular payroll with everyone else."

19 (Testimony of Complainant, Turnbull; Ex. A16)

20 26) Complainant talked to Howell after her visit to Blue Gryphon, and Howell
21 told Complainant that she had left Blue Gryphon at 4:30 p.m. on April 4, 2013.

22 (Testimony of Complainant)

23 27) Prior to filing his complaint with BOLI, Complainant did not tell Turnbull
24 that he was making a report to Lane County. (Testimony of Complainant)

1 28) Prior to his discharge, Complainant had never been disciplined or written
2 up and believed he was a "valued employee." (Testimony of Complainant)

3 29) Between March 31 and April 4, Complainant was "really upset" that he had
4 been suspended and felt "really bad." He believed he had been suspended because he
5 had authorized Armijo's March 28 food purchases. Three of Blue Gryphon's residents
6 had been at Blue Gryphon for Complainant's entire tenure and a fourth resident had
7 been there for a year at the time of Complainant's suspension and he had developed
8 relationships with them. It was hard for him not to see them and not to be able to say
9 goodbye to anyone. (Testimony of Complainant)

10 30) When Complainant received Turnbull's April 4 text messages, he believed
11 he had been fired because of Turnbull's statement telling him that he could not return to
12 the premises and to return his keys. Because of the coincidence in timing between
13 Turnbull's 4:38 p.m. text message and Howell's 4:30 p.m. departure, he believed he had
14 been fired because of his complaint to Lane County Protective Services. He felt
15 "confused," "angry," and "sad." He questioned whether it was "worth it" to make the
16 complaint. He questioned "what [he] was going to do" in the future. He began looking
17 for day work, but it took him "nine months to a year" to find work. During that time, he
18 collected unemployment benefits that were "substantially less" than his pay at Blue
19 Gryphon. At the time of the hearing, he was still upset over his termination. (Testimony
20 of Complainant; Observation of ALJ)

21 31) Shortly after April 4, Complainant was contacted by Lane County Mental
22 Health and referred to a night job that he turned down because he cannot work nights.
23 (Testimony of Complainant)

24 32) It was a financial hardship for Complainant to be out of work. Complainant
25 lost a vehicle and was behind on his rent for a while. (Testimony of Complainant)

1 33) Blue Gryphon was shut down on April 22, 2013, and did not reopen. At
2 that time, Complainant had actively sought, but not found, another job. (Testimony of
3 Turnbull)

4 34) Had Complainant not been suspended and discharged, he would have
5 worked another 15 days in total, earning \$1,620 gross wages (9 hours x \$12 per hour x
6 15 days = \$1,620). (Testimony of Complainant, Turnbull; Calculation of ALJ)

7 35) The Oregon Administrative Rules applicable to food and meals at Blue
8 Gryphon and other adult foster homes in Oregon are OAR 411-050-0645(4) and OAR
9 309-040-0385. In pertinent part, they read as follows:

10 **OAR 411-050-0645(4)**

11 "MEALS.

12 "(a) Three nutritious meals must be served daily at times consistent with those
13 in the community. Each meal must include food from the basic groups according
14 to the United States Department of Agriculture (USDA's) My Plate and include
fresh fruit and vegetables when in season.

15 " * * * * *

16 "(d) There must be no more than a 14-hour span between the evening and
17 morning meals. Snacks do not substitute for a meal in determining 14-hour
nutritional requirements."

18 **OAR 309-040-0385**

19 "Food services

20 "(1) Well-balanced Diet. Three nutritious meals will be served daily times
21 consistent with those in the community. Meals will be planned and served in
22 accordance with the recommended dietary allowances found in the United States
Department of Agriculture Food Guide Pyramid or as directed by a prescriber.* *

*

23 " * * * * *

24 "(5) Supply of Food. Adequate supplies of Staple foods, for a minimum of one
week, and perishable foods, for a minimum of two days, will be maintained on the
premises."

25 (Judicial Notice)

1 **Credibility Findings**

2 36) Matthew Butler and Katie Haynes were credible witnesses and the forum
3 has credited their testimony in its entirety. (Testimony of Butler, Haynes)

4 37) Complainant testified in a calm, straightforward manner concerning the
5 events that led him to file his complaint with BOLI and the emotional and mental
6 suffering he experienced as a result of his suspension and termination. His testimony
7 was consistent with his prior statements and the exhibits offered and received as
8 evidence. The forum found Complainant to be a credible witness, with one exception.
9 He testified that in March 2013 he was aware of an Oregon Administrative Rule for
10 foster homes that required that "a home must maintain at least two weeks food at all
11 times," whereas neither the Agency nor Complainant was able establish the existence
12 of such a rule. Aside from that, the forum has credited his testimony in its entirety,
13 crediting Complainant's testimony whenever it conflicted with Turnbull's for reasons
14 explained in Turnbull's credibility finding. (Testimony of Complainant)

15 38) Flora Turnbull testified at length about Complainant's extensive
16 performance problems from October 2012 to March 31, 2013, including how he abused
17 her and his coworkers, and claimed to have given him repeated warnings. She also
18 testified that his abusive speech towards her over the phone on March 31 was the last
19 straw in Complainant's history of abusive behavior and the reason for his suspension.
20 However, this testimony was inconsistent with her actual behavior towards Complainant
21 during this time period, which included keeping him on as manager from October 2012
22 through December 2013, trusting him with her credit card and Blue Gryphon's finances,
23 and making him interim manager during her March 2013 vacation. She produced no
24 documentation of Complainant's alleged extensive performance problems, testifying
25 that she did not document any disciplinary actions with regard to any employee. She

1 presented no witnesses to support her case in chief, although this may have been a
2 function of her failure to file a timely case summary, and called no impeachment
3 witnesses. In addition, she made some key inconsistent statements. In her answer,
4 she stated “[f]rom the first day I heard about the complaints and the investigation, April
5 4th, until mid-May when I spoke with the BOLI investigator, I absolutely believed that it
6 was not the complainant or any other staff person who had made any complaints,
7 because that is what I was told.” In contrast, she told Butler and also testified that her
8 initial thought in response to Howell’s April 4 phone call was that Complainant had
9 made the complaint in retaliation for being suspended. Because of Turnbull’s
10 inconsistent statements about her belief concerning who filed the complaint with Lane
11 County, the conflict between her testimony and her actions concerning Complainant’s
12 performance, and her failure to produce any evidence corroborating her testimony, the
13 forum has only credited her testimony when it was either undisputed or corroborated by
14 other credible testimony. (Testimony of Turnbull)

15 **CONCLUSIONS OF LAW**

16 1) At all times material herein, Respondent Blue Gryphon was an employer
17 as defined in ORS 659A.001(4) that employed Complainant.

18 2) The actions, statements, and motivations of Flora Turnbull, Blue
19 Gryphon’s owner and sole member, are properly imputed to Blue Gryphon.

20 3) Complainant, acting in good faith and while employed by Blue Gryphon,
21 reported information that he believed was evidence of a violation of a state rule to
22 Turnbull and Lane County Protective Services.

23 4) Blue Gryphon, acting through Turnbull, suspended Complainant on March
24 31, 2013, because of his good faith report to Turnbull that he had authorized the
25

1 expenditure of Blue Gryphon's money on March 28, 2013, because the house "needed
2 food," thereby violating ORS 659A.199 and OAR 839-010-0100(1).

3 5) Blue Gryphon, acting through Turnbull, discharged Complainant from
4 employment on April 4, 2013, because he made a good faith report to Lane County
5 Protective Services that Blue Gryphon had inadequate food for its residents, thereby
6 violating ORS 659A.199 and OAR 839-010-0100(1).

7 6) Respondent Turnbull violated ORS 659A.030(1)(g) by suspending, then
8 discharging Complainant on behalf of Respondent Blue Gryphon.

9 7) The Commissioner of the Bureau of Labor and Industries has jurisdiction
10 of the persons and of the subject matter herein. ORS 659A.800 to ORS 659A.865.

11 8) Pursuant to ORS 659A.850, the Commissioner of the Bureau of Labor and
12 Industries has the authority under the facts and circumstances of this case to award
13 Complainant back pay and money damages for emotional and mental suffering
14 sustained and to protect the rights of Complainant and others similarly situated. The
15 sum of money awarded and the other actions required of Respondents in the Order
16 below are an appropriate exercise of that authority.

17 **OPINION**

18 **Introduction**

19 In its Formal Charges, the Agency alleges that Blue Gryphon, through Turnbull,
20 violated ORS 659A.199 and OAR 839-010-0100 by suspending, then discharging
21 Complainant, and that Turnbull violated ORS 659A.030(1)(g) by aiding and abetting
22 Blue Gryphon to commit these acts. The Agency seeks to recover back pay and
23 damages for emotional distress on Complainant's behalf.

1 **Blue Gryphon Violated ORS 659A.199 and OAR 839-010-0100(1).**

2 ORS 659A.199(1) provides, in pertinent part:

3 "It is an unlawful employment practice for an employer to discharge, demote,
4 suspend * * * an employee * * * for the reason that the employee has in good
5 faith reported information that the employee believes is evidence of a violation of
a state or federal law, rule or regulation."

6 OAR 839-010-0100(1), BOLI's administrative rule interpreting ORS 659A.199, provides
7 in pertinent part:

8 "ORS 659A.199 prohibits any employer with one or more employees in Oregon
9 from discharging, demoting, suspending* * * an employee * * * for the reason that
10 the employee has in good faith reported information to anyone that the employee
believes is evidence of a violation of any state or federal law, rule or regulation."
(Emphasis added)

11 The Agency's prima facie case consists of the following elements: (1) Blue
12 Gryphon was an employer as defined by statute; (2) Blue Gryphon employed
13 Complainant; (3) Complainant, in good faith, reported information to someone that he
14 believed was evidence of a violation of a state rule; (4) Blue Gryphon suspended, then
15 discharged Complainant; (5) Blue Gryphon suspended and discharged Complainant
16 because of his report(s). *Cf. In the Matter of Cleopatra's, Inc.*, 26 BOLI 125, 132 (2005).

17 Elements (1) and (2) are undisputed.

18 Under ORS 659A.199, an employee "reports" information when the employee
19 communicates information to anyone that the employee believes is evidence of a
20 violation of state law. *In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly*
21 *Schoene*, 34 BOLI 80, 96 (2015). The Agency proved by a preponderance of the
22 evidence that Complainant believed Blue Gryphon's food shortage was a violation of
23 Oregon Administrative Rules governing adult foster homes. Although the OARs do not
24 require foster homes to maintain a two-week supply of food as asserted by
25 Complainant, they clearly require foster homes to serve three nutritious meals a day,

1 including fresh fruit and vegetables when in season, and to maintain perishable foods
2 for a minimum of two days. OAR 411-050-0645(4), OAR 309-040-0385. The "good
3 faith" requirement in ORS 659A.199 is met when the whistleblower has a reasonable
4 belief that the information reported has occurred and that the information, if proven,
5 constitutes evidence of a violation of a state or federal law, rule or regulation. *Id.*, at 93.
6 Complainant credibly testified that Blue Gryphon had no perishable foods available for
7 lunch on March 28 and Complainant and Haynes both credibly testified that Blue
8 Gryphon had no perishable foods in the house on March 29. Both circumstances
9 violate OAR 411-050-0645(4) and OAR 309-040-0385. Based on this credible
10 testimony, the forum concludes that Complainant had a reasonable belief that the food
11 shortage he reported had occurred and that the information he reported, if proven,
12 constituted evidence of a violation of a state rule, thereby meeting the "good faith"
13 requirement in ORS 659A.199. Finally, Complainant made three communications that
14 qualify as "reports" of information under ORS 659A.199: (1) He told Katie Haynes that
15 Blue Gryphon lacked adequate food; (2) He told Turnbull that he authorized Armijo's
16 food purchases because Blue Gryphon "needed" food; and (3) He called Lane County
17 Protective Services and reported Blue Gryphon's food shortage. These facts satisfy
18 the third element of the Agency's prima facie case.

19 Element (4) relates to the adverse actions – the suspension and discharge --
20 allegedly taken against Complainant. It is undisputed that Blue Gryphon suspended
21 Complainant on March 31, 2013. However, Respondents argue that Complainant was
22 never discharged, in that Howell, during her visit to Blue Gryphon on April 4, 2013, told
23 Turnbull that she could not change any employee's employment status until her
24 investigation was complete. The Agency argues that the content of Turnbull's text
25 message to Complainant at 4:38 p.m. on April 4, coupled with her testimony about her

1 state of mind, shows that Complainant was discharged. Turnbull's text message read
2 as follows:

3 "If you have any keys or anything else belonging to the house, you need to return
4 them immediately. You are not welcome on the premises yourself. Give
whatever you have to another employee to return."

5 Turnbull's testimony about her state of mind on March 31 when she suspended
6 Complainant lends further context:

7 "I just wanted him to calm down and explain to me what happened. It was my
8 intention to see what he had to say and try and still try to work it out. * * * I had
9 come to a conclusion that if he didn't really have a better explanation, a good
10 explanation for what had happened, and if he couldn't really work on the issues, I
was going to let him go at that point but I still wanted to talk to him and see what
he had to say."

11 There is no evidence that Complainant and Turnbull talked again before her April 4 text
12 message in which she ordered him to turn in his keys and told him that he was not
13 welcome on the premises. Based on above, the forum concludes that Complainant was
14 discharged on April 4, 2013.

15 Element (5) requires the Agency to prove a nexus between Complainant's
16 whistleblower protected class status and his suspension and discharge. The forum
17 analyzes Complainant's suspension and discharge separately.

18 ***Complainant's March 31, 2013, Suspension***

19 The evidence is clear that Turnbull suspended Complainant because she was
20 upset with him. The forum's job is to decide why Turnbull was upset and determine if
21 her resulting decision to suspend Complainant violated the law. A review of the chain of
22 events leading up to Complainant's suspension, combined with the immediate
23 circumstances of his suspension, reveals the answer.

24 The starting point in the forum's analysis is the undisputed fact that Turnbull's
25 and Blue Gryphon's finances were one and the same, operating out the same account.

1 There is nothing unlawful about this arrangement, but it meant that all money spent on
2 behalf of Blue Gryphon had an immediate and direct impact on Turnbull's personal
3 finances. Complainant started work for Blue Gryphon in May 2011 as a caregiver who
4 was paid \$11 per hour. In 2012 he was promoted to assistant manager and his pay
5 increased to \$15 per hour. In January 2013 he was demoted to the position of
6 appointments coordinator when Anthony Culver, Turnbull's fiancé/partner, returned to
7 work and assumed some of Complainant's duties. At that time, Complainant's pay was
8 reduced to \$12 per hour. About the same time, Turnbull reduced Blue Gryphon's food
9 budget from \$1200 per month to \$800 per month and created a new shopping
10 arrangement because she perceived that money was being spent for food that was not
11 eaten by Blue Gryphon's residents. On March 23 or March 24, 2013, Turnbull and
12 Culver left for a one week vacation to California. Before leaving, Turnbull appointed
13 Complainant as interim manager during her absence and raised his pay to \$15 per
14 hour. She also instructed him not to spend more than \$20 for food while she was gone.

15 On March 28, Complainant's coworker Armijo reported that there was no food at
16 Blue Gryphon with which to make lunches for the residents. In response, Complainant
17 authorized Armijo to spend up to \$30 to purchase perishables. About the same time,
18 Turnbull found out that the room tax for her vacation hotel was far more than she had
19 expected. Her reaction to Blue Gryphon's food expenditure was immediate, as shown
20 in her first text message to Complainant:

21 **March 28, 5:51 p.m. (Turnbull→Complainant):** "Someone spent a bunch of
22 money today, almost 30, I don't have that. I had said don't spend more than 20
23 here. Who's doing that?" (Emphasis added)

24 In response, Complainant texted the following:

25 **March 28, 6:31 p.m. (Complainant→Turnbull):** "I'm sorry that Gina over spent.
The house needed food. I don't know what else to say Flora."

1 Turnbull's reaction to Complainant's response and the financial impact on her vacation
2 plans is clearly revealed in the next series of text messages between Complainant and
3 Turnbull:

4 **March 29, 8:27 a.m. (Turnbull→Complainant):** "ABSOLUTELY NO MORE
5 SPENDING AT ALL UNTIL I GET BACK. FROM NOW ON ANY SPENDING
6 WILL NEED TO BE PRE-AUTHORIZED BY ME EVERY TIME. IF THERE IS
7 ANY PETTY CASH IT SHOULD BE DEPOSITED IN BANK IMMEDIATELY.
Eddie knows he needs to buy his own lunch anyway, as do staff. I need that will
check to be dropped off today. Please let me know when you do that."

8 **March 29, 8:31 a.m. (Complainant→Turnbull):** "Understood."

9 **March 29, 8:42 a.m. (Turnbull→Complainant):** "Is there any petty cash?"

10 **March 29, 8:59 a.m. (Complainant→Turnbull):** "There is \$16.37 that I will
11 deposit when Raquel comes on shift."

12 **March 29, 9:03 a.m. (Turnbull→Complainant):** "Cool, thanks. Now we get to eat
today." (Emphasis added)

13 The next event was Turnbull's March 31 phone call to Complainant in which she
14 demanded to know why it was necessary for Complainant to authorize Blue Gryphon's
15 March 28 expenditure for food. Complainant's explanation was that the residents
16 needed food. After that call, Turnbull sent Complainant yet another text message
17 stating:

18 "It is not healthy for the residents to have a staff there with such a negative
19 attitude and making such questionable judgment calls, especially when refusing
20 to even explain the reasoning behind your choices. So consider yourself
suspended for now and we'll have to talk about where to go from there."

21 At hearing, Turnbull explained her reason for using the phrase "questionable judgment
22 calls:"

23 **Q:** "What questionable judgment call was that; to buy food?"

24 **A:** No, it was to tell me that food was needed and then to give Gina a list of
25 things to buy without ever talking to me when we had talked many times about
authorizing extra purchases with me first. And then he didn't respond to me the
entire day when I was trying to find out why; he never responded."

1 Turnbull testified that she suspended Complainant because of the abusive attitude he
2 displayed during their March 31 phone conversation. She described Complainant's
3 abusive behavior over the previous six months in detail and testified that she just could
4 not take it any longer. The forum does not believe Turnbull's stated reason for
5 suspending Complainant because: (1) Turnbull, not Complainant, initiated whatever
6 yelling took place during the March 31 phone call;⁷ (2) Turnbull was not a credible
7 witness;⁸ (3) Turnbull was clearly upset that Complainant's expenditure for food for Blue
8 Gryphon's residents posed an imminent threat to Turnbull's vacation plans; and (4)
9 there is no credible evidence that Turnbull had repeatedly warned Complainant in the
10 past for "abusive" behavior or that he had actually engaged in that behavior in the past.
11 These facts, combined with Turnbull's testimony that Complainant was unable to give
12 her a satisfactory explanation as to why Blue Gryphon's residents "needed food," lead
13 the forum to conclude that Turnbull suspended Complainant because he reported Blue
14 Gryphon's need for food to Turnbull.

15 Respondents argue that since Complainant only raised the issue that Blue
16 Gryphon "needed" food and never complained of a "current" food shortage,
17 Complainant never actually blew the whistle. This is a red herring. Although he may
18 not have intended to become a whistleblower at that time, Complainant became a
19 whistleblower entitled to the protection of ORS 659A.199 when he told Turnbull that he
20 had authorized the purchase of food because Blue Gryphon "needed" food, a
21 circumstance that he believed violated Oregon adult foster home rules. Using
22 Respondents' reasoning, no one reporting past circumstances, no matter how
23 egregious, would be entitled to protection as a whistleblower. That is not the law.

24 _____
25 ⁷ See Finding of Fact #21 – The Merits.

⁸ See Finding of Fact #38 – The Merits.

1 ***Complainant's April 4, 2013, Discharge***

2 When Turnbull suspended Complainant on March 31, 2013, she was upset at
3 him because of the money he spent in her absence and the reason – “needed food” –
4 why he authorized the expenditure. At that point, she still wanted to talk to him again
5 and had not made a decision to discharge him. Between March 31 and Complainant's
6 discharge, the only intervening circumstance was Howell's April 4 phone call to Turnbull
7 and visit to Blue Gryphon. Turnbull testified that her first reaction to Howell's phone call
8 was to think that Complainant had retaliated against her for his suspension by making
9 the complaint. During her subsequent visit, Howell told Turnbull that she was
10 investigating a complaint of lack of food in the house and that an “outside” person made
11 the complaint. Howell left Blue Gryphon at 4:30 p.m. Eight minutes later, Turnbull sent
12 a text message to Complainant in which she told him to turn in his keys and stay off
13 Blue Gryphon's property, a communication that the forum has concluded was
14 Complainant's discharge. Turnbull testified that she had no reason to think that
15 Complainant made the complaint that spurred Howell's investigation based on Howell's
16 “outside person” statement. However, based on Turnbull's testimony about her initial
17 conclusion that Complainant made the complaint, the fact that Howell told Turnbull that
18 the complaint was about a lack of food – the very issue Complainant had reported to
19 Turnbull before his suspension, and the timing⁹ of Turnbull's text message, the forum
20 does not believe Turnbull and concludes that Turnbull discharged Complainant because
21 Turnbull believed he had blown the whistle to Lane County about Blue Gryphon's lack of
22 food. That discharge violated ORS 659A.199 and OAR 839-010-0100.

23
24 _____
25 ⁹ See *In the Matter of Crystal Springs Landscapes, Inc.*, 32 BOLI 144, 166 (2012)(the forum relied on the fact of complainant's discharge the day after she explicitly rejected respondent's sexual conduct as an element supporting her retaliation claim).

1 ***Turnbull Aided & Abetted Blue Gryphon in Violation of ORS 659A.030(1)(g)***

2 In this case, Blue Gryphon was an Oregon limited liability company and Turnbull
3 was Blue Gryphon's sole owner and member. An owner of an LLC who commits acts
4 rendering the LLC liable for an unlawful employment practice may be found to have
5 aided and abetted the LLC 's unlawful employment practice. *In the Matter of Alpine*
6 *Meadows Landscape*, 19 BOLI 191, 213-14 (2000). Aiding and abetting, in the context
7 of an unlawful employment practice, means "to help, assist, or facilitate the commission
8 of an unlawful employment practice, promote the accomplishment thereof, help in
9 advancing or bring it about, or encourage, counsel or incite as to its commission." *In the*
10 *Matter of Hey Beautiful Enterprises, Ltd.*, 34 BOLI 80, 97 (2015), citing *In the Matter of*
11 *Crystal Springs Landscapes, Inc.*, 32 BOLI 144, 166-67 (2012); *In the Matter of Dr.*
12 *Andrew Engel, DMD, PC*, 32 BOLI 94, 137 (2012); *In the Matter of Cyber Center, Inc.*,
13 32 BOLI 11, 35 (2012). Here, Turnbull was solely responsible for Complainant's
14 suspension and discharge. Accordingly, the forum concludes that Turnbull violated
15 ORS 659A.030(1)(g) through Blue Gryphon's suspension and discharge of
16 Complainant. This makes her jointly and severally liable with Blue Gryphon for all
17 damages awarded by the forum.

18 **Damages**

19 The Agency seeks to recover lost wages, estimated to be \$42,640, and damages
20 for "physical, mental and emotional distress" in an amount "estimated to be at least
21 \$30,000."

22 **A. Lost Wages and Tips**

23 The commissioner has the authority to fashion a remedy adequate to eliminate
24 the effects of unlawful employment practices. *In the Matter of From the Wilderness*, 30
25 BOLI 227, 290 (2009). The purpose of back pay awards in an employment

1 discrimination case is to compensate a complainant for the loss of wages and benefits
2 that he or she would have received but for the respondent's unlawful employment
3 practices. Awards are calculated to make a complainant whole for injuries suffered as a
4 result of the discrimination. *In the Matter of Trees, Inc.*, 28 BOLI 218, 251 (2007). A
5 complainant who seeks back pay is required to mitigate damages by using reasonable
6 diligence to find other suitable employment. *In the Matter of Rogue Valley Fire*
7 *Protection*, 26 BOLI 172, 184 (2005).

8 Had Complainant not been suspended and discharged, he would have
9 presumably returned to his job as medical appointments coordinator at \$12 per hour¹⁰
10 and worked another 15 days in total until Blue Gryphon closed its doors on April 22,
11 2013, earning \$1,620 in gross wages (9 hours x \$12 per hour x 15 days = \$1,620).
12 Through Complainant's credible testimony, the Agency established that he began
13 looking for replacement work shortly after his discharge, satisfying the forum's
14 reasonable diligence standard. The forum awards Complainant \$1,620 in lost wages.

15 **B. Emotional and Mental Suffering Damages**

16 In determining an award for emotional and mental suffering, the forum considers
17 the type of discriminatory conduct, and the duration, frequency, and severity of the
18 conduct. It also considers the type and duration of the mental distress and the
19 vulnerability of the complainant. The actual amount depends on the facts presented by
20 each complainant. A complainant's testimony, if believed, is sufficient to support a
21 claim for mental suffering damages. *In the Matter of Crystal Springs Landscapes, Inc.*,
22 32 BOLI 144, 170 (2012).

23
24
25 ¹⁰ The Agency argued that Complainant would have continued to earn \$15 per hour after Turnbull's and
Culver's return from vacation, but there is no evidence in the record to support that conclusion.

1 Between March 31 and April 4, Complainant was “really upset” and felt “really
2 bad” about his suspension, particularly because he reasonably believed Turnbull
3 suspended him because he had authorized the food purchases. Complainant also had
4 a reasonable contemporaneous belief that he was fired because he complained to Lane
5 County Protective Services about an inadequate food supply for Blue Gryphon’s
6 residents. He felt “confused,” “angry,” and “sad” and questioned the wisdom of making
7 his complaint, an action he was legally obligated to take because of his status as a
8 mandatory reporter.¹¹ He had formed close, long-term relationships with Blue
9 Gryphon’s residents and it was particularly hard for him not to see them and not to be
10 able to say goodbye. He questioned what his future would look like. During the
11 subsequent year that he was out of work, he experienced financial difficulties while he
12 lived on unemployment benefits that were “substantially less” than his pay at Blue
13 Gryphon.¹² At the time of the hearing, he was still upset over his termination.

14 In a recent whistleblower case, the forum awarded the complainant \$10,000 for
15 emotional and mental suffering. *In the Matter of Hey Beautiful Enterprises, Ltd.*, 34
16 BOLI 80, 101 (2015). In that case, complainant worked three weeks for respondent
17 before she was suspended, then discharged for complaining about not being paid her
18 wages. She testified that she loved working for respondent, whom she regarded as a
19 mentor, that she felt angry and emotionally distraught when she was suspended, and
20

21 ¹¹ OAR 400-050-0665(1)(a) requires “all facility employees” at Oregon adult foster care homes “to
22 immediately report abuse and suspected abuse to the investigative authority.” Per OAR 411-050-
23 0602(2), the pertinent definition of “abuse” is found in OAR 411-020-0002. OAR 411-020-0002(1)
24 provides, in pertinent part, that “(1) “Abuse” means any of the following: * * * (b) NEGLECT. Neglect
25 including: (A) Failure to provide the basic care, or services necessary to maintain the health and safety of
an adult[.]”

¹² Complainant testified that his car was repossessed and he was behind on his rent for a while as a
result of his discharge. However, there is insufficient evidence in the record to determine the actual
impact of Complainant’s discharge on these events, primarily because of the forum’s conclusion that
Complainant only lost 15 days’ pay, in contrast to the \$42,000 in lost wages sought in the Charges.

1 depressed because she was never called back to work. She suffered stress from her
2 subsequent unemployment, but there was no evidence that she attempted to mitigate
3 her damages. Complainant's longevity of employment and his significant attachment to
4 Blue Gryphon's residents distinguish this case from *Hey Beautiful*, and the forum
5 concludes that \$20,000 is an award commensurate with the mental and emotional
6 distress Complainant experienced as a result of his suspension and discharge from
7 Blue Gryphon.

8 **Mandatory Training on the Correct Interpretation and Application of Oregon Laws**
9 **Pertaining to Whistleblowers**

10 In its Formal Charges, the Agency asked that Respondent Turnbull be trained, at
11 her expense, "on the correct interpretation and application of the Oregon laws pertaining
12 to whistleblowing, by the Bureau of Labor and Industries Technical Assistance for
13 Employers Unit or other trainer agreeable to the Agency."

14 BOLI's Commissioner is authorized to issue an appropriate cease and desist
15 order reasonably calculated to eliminate the effects of any unlawful practice found.
16 ORS 659A.850(4). Among other things, that may include requiring a respondent to:

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

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

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

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

25 This statute gives the Commissioner the authority to require Respondent Turnbull to
undergo training of the type sought in the Formal Charges. The forum finds that this
requirement is appropriate in this case.

1 **Respondents' Exceptions**

2 Respondents raise six exceptions.

- 3 1. *There is no evidence that Respondent Turnbull was aware that Complainant had*
4 *made a food shortage report before she "suspended"¹³ Complainant. Instead,*
5 *Turnbull suspended Complainant "because he failed to report to her the lack of food,*
6 *before it ran out, and for his anger and loud outbursts."*

7 Respondents' exception relies on Turnbull's version of the facts that the ALJ
8 found to be not credible. The ALJ's credibility findings are supported by a
9 preponderance of the evidence in the record. Respondents' exception is overruled.

- 10 2. *OAR 839-010-0100(1) is invalid insofar as it prohibits retaliation by employers*
11 *against employees who make a report to the employer only.*

12 Respondents argue that BOLI exceeded its authority in drafting OAR 839-010-
13 0100(1) to protect whistleblowers who make "internal complaints" only and that
14 Respondents cannot be held liable for taking an adverse action against Complainant
15 based on his report to Turnbull of insufficient food at Blue Gryphon. Respondents raise
16 two points in support of their argument.

17 First, Respondents rely on *Lamson v. Crater Lake Motors, Inc.*, 346 Or 628
18 (2009), stating that *Lamson* held that "a wrongful discharge claim based on retaliation
19 for 'whistleblowing' under ORS 659A.230 requires that the complaint be made to a
20 recognized outside authority legally vested with the power to take action on such
21 complaints, and that internal complaints, without more, are normally insufficient."
22 Respondents' reliance is misplaced. The only issue in *Lamson* was whether the plaintiff
23 had been wrongfully discharged, a common law tort decided based on case law that is
24 not controlling in this case.

25 _____
¹³ As discussed earlier in the Opinion, Respondents contend that Complainant was never discharged.

1 Second, Respondents argue that “there is no suggestion in the statutes that an
2 entirely internal complaint suffices” and that the broad language in OAR 839-010-
3 0100(1) that gives a cause of action to a person who reports information “to anyone” is
4 *ultra vires*. Stated again, ORS 659A.199(1) provides:

5 “It is an unlawful employment practice for an employer to discharge, demote,
6 suspend * * * an employee * * * for the reason that the employee has in good
7 faith reported information that the employee believes is evidence of a violation of
8 a state or federal law, rule or regulation.”

8 OAR 839-010-0100(1) provides:

9 “ORS 659A.199 prohibits any employer with one or more employees in Oregon
10 from discharging, demoting, suspending* * * an employee * * * for the reason that
11 the employee has in good faith reported information to anyone that the employee
12 believes is evidence of a violation of any state or federal law, rule or regulation.”

11 An agency's powers are limited to those delegated to it by statute. *Ettinger v. Denny*
12 *Chancler Equip. Co.*, 139 Or. App. 103, 108, 910 P.2d 420, 423 (1996), citing *U. of O.*
13 *Co-Oper. v. Dept. of Rev.*, 273 Or. 539, 550, 542 P.2d 900 (1975). “An act of a * * *
14 governmental entity is *ultra vires* when that act falls outside the entity's corporate
15 powers.” *W. Linn Corp. Park, L.L.C. v. City of W. Linn*, 349 Or. 58, 96, 240 P.3d 29, 50
16 (2010), citing *Keeney v. City of Salem*, 150 Or. 667, 669–71, 47 P.2d 852 (1935).

17 ORS 651.060(4) gives BOLI's commissioner the authority to “adopt such
18 reasonable rules as may be necessary to administer and enforce any statutes over
19 which the commissioner or the bureau has jurisdiction.” OAR 839-010-0100(1), which
20 interprets ORS 659A.199, a statute BOLI's commissioner is authorized to enforce, is
21 such a rule. ORS 659A.800. ORS 659A.199, adopted in 2009, does not identify a
22 person or entity or limit the category of persons or entities to whom an employee must
23 report information in order to attain the status of protected whistleblower under the
24 provisions of ORS 659A.199. Had the legislature intended to create such a limitation, it
25

1 knows how to do that and could have done so.¹⁴ The forum's inclusion of such a
2 limitation in its interpretation of ORS 659A.199 would also violate the provision of ORS
3 174.010(1) that prohibits a judge from "insert[ing] what has been omitted" when
4 interpreting a statute. In conclusion, the forum finds that BOLI's inclusion of the phrase
5 "to anyone" in OAR 839-010-0100(1) was a valid exercise of BOLI's rulemaking
6 authority and not *ultra vires*. Respondent's exception is overruled.

7
8 3. *There was no evidence as to an insufficient supply of food at Blue Gryphon during
Turnbull's vacation.*

9 Findings of Fact ##14 and 19 – The Merits, support this conclusion.
10 Respondents' exception lacks evidentiary support and is overruled.

11 4. *There was insufficient evidence of economic damages.*

12
13 The ALJ's computation of Complainant's lost wages was based on Complainant's
14 credible, undisputed testimony about his work schedule and wage prior to his
15 temporary promotion to the position of interim manager during Turnbull's absence. The
16 forum has historically computed back pay awards to discharged complainants based on
17 the number of hours they worked and wage they earned prior to their discharge.¹⁵ The
18 ALJ's computation follows the forum's precedent. Respondents' exception is overruled.

19
20
21 ¹⁴ For example, ORS 659A.203 protects whistleblowing public employees who discuss activities of the
22 state or any agency or political subdivision "with any member of the Legislative Assembly, legislative
23 committee staff acting under the direction of a member of the Legislative Assembly, any member of the
elected governing body of a political subdivision in the state or any elected auditor of a city, county or
metropolitan service district."

24
25 ¹⁵ See, e.g., *In the Matter of Spud Cellar Deli, Inc.*, 31 BOLI 106, 139 (2010); *In the Matter of From the
Wilderness, Inc.*, 30 BOLI 227, 290 (2009); *In the Matter of Robb Wochnick*, 25 BOLI 265, 288 (2004); *In
the Matter of Southern Oregon Subway, Inc.*, 25 BOLI 218, 242 (2004).

1 5. *Complainant failed to mitigate his damages.*

2 Respondents' argument rests on the undisputed fact that Complainant declined
3 an offer of a similar job shortly after his discharge in which he would have been
4 scheduled to work night shift. Even assuming that Complainant had occasionally
5 worked a night shift in the past, his regular shift throughout his employment with Blue
6 Gryphon was 8 a.m. to 5 p.m. Complainant also credibly testified that, at the time of his
7 discharge, he was not able to work a night job. Under these circumstances,
8 Complainant was not required to accept a night shift job in order to meet the forum's
9 standard of using reasonable diligence to find other suitable employment.
10 Respondents' exception is overruled.

11 6. *The proposed award of \$20,000 for emotional distress is "unreasonable and out of
12 proportion."*

13 Respondents argue that the forum erred by including emotional distress "that
14 undoubtedly resulted from the closing of the business" and that \$20,000 is "dramatically
15 out of line with what citizens in Lane County generally award in employment
16 discrimination/retaliation cases." The forum's award is consistent with its own
17 precedent and is less than the amount sought by the Agency in its Formal Charges.
18 Respondents' exception is overruled.

19 **ORDER**

20 A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS
21 659A.850(4), and to eliminate the effects of Respondent **Blue Gryphon, LLC's**
22 violations of ORS 659A.199 and OAR 839-010-0100 and Respondent **Flora Turnbull's**
23 violation of ORS 659A.030(1)(g), and as payment of the damages awarded, the
24 Commissioner of the Bureau of Labor and Industries hereby orders Respondents **Blue**
25 **Gryphon LLC** and **Flora Turnbull** to deliver to the Administrative Prosecution Unit of
the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street,

1 Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and
2 Industries in trust for Complainant **Lewis Garchow** in the amount of:

3 1) ONE THOUSAND SIX HUNDRED AND TWENTY DOLLARS (\$1,620),
4 less lawful deductions, representing wages lost by Lewis Garchow between April 1 and
5 April 22, 2013, as a result of Respondents' unlawful employment practice found herein;
6 plus,

7 2) TWENTY THOUSAND DOLLARS (\$20,000), representing compensatory
8 damages for emotional and mental suffering experienced by Lewis Garchow as a result
9 of Respondents' unlawful employment practice found herein; plus,

10 3) Interest at the legal rate on the sum of TWENTY-ONE THOUSAND SIX
11 HUNDRED AND TWENTY DOLLARS (\$21,620) until paid.

12 B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS
13 659A.850(4), and to eliminate the effects of Respondents' unlawful employment
14 practices found herein, the Commissioner of the Bureau of Labor and Industries hereby
15 orders Respondent **Flora Turnbull**, within 12 months after the Final Order is issued, to
16 participate in training, at her expense, on the correct interpretation and application of the
17 Oregon laws pertaining to whistleblowers by the Bureau of Labor and Industries
18 Technical Assistance for Employers Unit or other trainer agreeable to the Agency.

19 C. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS
20 659A.850(4), and to eliminate the effects of Respondents' unlawful employment
21 practices found herein, the Commissioner of the Bureau of Labor and Industries hereby
22 orders Respondents **Blue Gryphon LLC** and **Flora Turnbull** to cease and desist from
23 violating the provisions of ORS 659A.199, OAR 839-010-0100, and ORS
24 659A.030(1)(g) relating to unlawful employment discrimination against whistleblowers.

25 

Brad Avakian, Commissioner
Bureau of Labor and Industries

Issued ON: 11/24/15