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1.0 JURISDICTION (*see also* Ch. III, sec. 91.0)

❑ In a housing case, when the agency's formal charges plead that a complainant's minor daughter was an "aggrieved person" who was entitled to damages, the commissioner lacked jurisdiction to pursue the allegations related to complainant's minor daughter because she never signed a complaint as required by the agency's administrative rule. ***----- In the Matter of Kenneth Wallstrom, 32 BOLI 63, 87 (2012).***

2.0 COMMISSIONER, ADMINISTRATIVE LAW JUDGE

2.1 --- Duties and Authority

2.1.1 --- Generally

❑ The commissioner has jurisdiction over the subject matter and respondents when respondent was an Oregon employer that employed claimant. ***---- In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI Orders 263, 268 (2014).***

❑ In construing a statute, the forum is responsible for identifying the correct interpretation, whether or not asserted by the parties. But the forum is not required to consider the constitutionality of a statute, and the forum chose not to do so where constitutionality was not raised as an affirmative defense. ***----- In the Matter of Blachana, LLC, 32 BOLI 220, 249 (2013).***

Appeal pending.

2.1.2 --- Threats, Dangerous Weapons

2.2 --- Conflict of Interest, Bias, Prejudice

2.3 --- Ex Parte Communications

3.0 ATTORNEYS, ADMINISTRATIVE PROSECUTORS, AND AUTHORIZED REPRESENTATIVES

3.1 --- Attorneys (*see also* 17.0, 24.6)

3.2 --- Administrative Prosecutors & Authorized Representatives

❑ Respondent was originally represented by Schoene as its authorized representative before respondent obtained counsel. When respondent's counsel withdrew, the ALJ issued an interim order advising the Schoene that respondent's retention of an attorney had nullified Schoene's status as respondent's authorized representative and that Schoene would have to file new letter authorizing her to act as respondent's authorized representative or hire another attorney if she wished respondent to avoid being held in default at the hearing. ***---- In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI Orders 189, 193 (2014).***

❑ At the outset of the hearing, the ALJ required an individual respondent Cina who had filed an answer on behalf of herself and her company to write and sign a statement authorizing her to act as authorized representative for her company. ***----- In the Matter of High Mountain Plumbing Company and Diana Marie Cina, 33 BOLI Orders 40, 41 (2014).***

❑ The forum denied Respondent's request, made during the hearing, to change its authorized representative. ***----- In the Matter of Dan Thomas Construction, Inc., 32 BOLI 174, 176 (2013).***

3.3 --- Attorney's Fees

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8.1 --- Generally

8.2 --- Relationship to Administrative Determination

8.3 --- Amendments

8.3.1 --- Prehearing Amendments

❑ When the agency moved to amend its formal charges to incorporate complainant's amended civil rights complaint, the ALJ granted the motion at hearing. ***---- In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 100 (2012).***

8.3.2 --- Amendments at Hearing

❑ When the agency moved to amend its formal charges to incorporate complainant's amended civil rights complaint, the ALJ granted the motion at hearing. ***---- In the Matter of Dr. Andrew Engel, DMD, PC, 32***

BOLI 94, 100 (2012).

8.4 --- Date of Issuance

8.5 --- Notice

8.6 --- Election of Remedies

8.7 --- Exhaustion of Administrative Remedies

8.8 --- Merger

❑ In its formal charges, the agency alleged that respondents reduced complainant's hours of work, effectively reducing her pay, after she opposed attending a symposium based on her religious beliefs, in violation of ORS 659A.030A(1)(b). Based on the same set of facts, the agency also alleged that respondents retaliated against complainant in violation of ORS 659A.030(1)(f) and OAR 839-005-0033, the agency's rule interpreting ORS 659A.030(1)(f). At hearing, the agency presented evidence from which it argued that the alleged cut in hours was set to take place during the one-week period immediately after complainant's termination. Since the ORS 659A.030A(1)(b) claim was also founded on complainant's opposition to attending the symposium, the forum concluded that it was properly a complaint of retaliation, and that the two charges were properly merged into a single charge of retaliation. ***----- In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 131-132 (2012).***

8.9 --- Respondents

8.10 --- Service

8.11 --- Sufficiency of Pleadings

❑ Neither OAR 839-050-0170(1) nor OAR 839-050-0020(3) require that formal charges, filed pursuant to a commissioner's complaint under ORS 659A.825 on behalf of the Rose City T-Girls, and/or those 'similarly situated', must join as complainants the individuals for whom the formal charges seek emotional distress damages. In those circumstances, the due process requirements of OAR 839-050-0060(1) were met. ***---- In the Matter of Blachana, LLC, 32 BOLI 220, 223 (2013).***

Appeal pending.

❑ The forum did not consider whether respondent's statement denying complainant's request for a service dog constituted "interference" under ORS 659A.145(8) because the formal charges did not allege that respondent "interfered" with complainant's exercise or enjoyment or her rights under ORS 659A.145(8). The forum lacks the authority to draw a legal conclusion on an allegation that is not set out in the Formal Charges. ***---- In the Matter of Kenneth Wallstrom, 32 BOLI 63, 79 (2012).***

8.12 --- Waiver

9.0 ORDERS OF DETERMINATION AND NOTICES OF INTENT

9.1 --- Generally

❑ Damages flowing from statutory wage violations are awarded by the forum based on the actual evidence produced at the hearing, regardless of the allegations in the OOD. ***---- In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI Orders 253, 261 (2014).***

9.2 --- Amendments

9.2.1 --- Prehearing Amendments

❑ Although the commissioner has jurisdiction over the agency's allegations that respondents violated ORS 652.195 and OAR 839-001-0300 by issuing two dishonored checks to claimant, those charges were dismissed because OAR 839-050-0440(4) precluded the agency from amending its original OOD to add those allegations. ***---- In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI Orders 263, 268 (2014).***

9.2.2 --- Amendments at Hearing

❑ In a wage case, at hearing the agency is not allowed to amend the order of determination to change the amount due. ***---- In the Matter of Bruce Crisman, dba Nu West Painting Contractors*, 32 BOLI 209, 215 (2013).**

❑ The agency's unopposed motion to amend the NOI to allege the prevailing wage rates that applied to the Project was granted. ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., et al, 32 BOLI 185, 187 (2013).***

❑ The agency's unopposed motion to delete a paragraph alleging that final wages were not paid to a particular worker was granted. ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 187 (2013).***

9.3 --- Service

❑ ORS 652.332(1) establishes an "administrative proceeding for wage claim collection" and covers all cases in which wage claims have been filed with BOLI. Relative to service of an OOD, ORS 652.332(1) requires that service of an OOD "shall be made in the same manner as service of summons **or** by certified mail, return receipt requested." (Emphasis added). Accordingly, sending an OOD by registered or certified mail to the correct address of the party, as provided in OAR 839-050-0030(1)(b), as the agency did in this case, is sufficient to accomplish service of an OOD. Therefore, the forum found that Sabo was properly served. ***---- In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI Orders 263, 272 (2014).***

9.4 --- Notice

9.5 --- Sufficiency of Pleadings

❑ When the formal charges alleged that respondent violated ORS 659A.112(1)(c) and OAR 839-006-0200(2)&(3)(c) by requiring complainant to submit a medical note each time he was tardy based on his disability and disciplining him, "including suspending him from work for two days, for arriving late to work on some occasions that were due to complainant's disability," the forum noted that ORS chapter 659A does not contain a statute numbered ORS 659A.112(1)(c) and that respondent cannot be found to have violated a statute that does not exist. ***---- In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI Orders 1, 36 (2014).***

❑ When the forum inferred from testimony and

exhibits that the alleged violations of prevailing wage laws arose from respondent's failure to include a $2.50 per hour bonus in computing overtime wages due, the allegations were dismissed on account of the agency's failure to identify the violations correctly in its notice of Intent or to move to amend the NOI. ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 197 (2013).***

❑ The forum found no violation of requirements to keep or provide records under OAR 839-020-0080 or 839-020-0083 when the agency's notice of intent failed to identify any records that respondents were required to keep and failed to keep and no evidence was presented at the hearing to assist the forum in identifying how respondents were deficient. ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 198-99 (2013).***

❑ When the allegation in the body of the NOI was that respondents filed inaccurate and incomplete certified statements for work performed on a project and failed to certify the accuracy of the payroll, and the allegation in the applicable exhibit to the NOI was that respondent failed to keep records for 11 weeks before the project had begun and make them available to BOLI, and there was no evidence of respondent's submissions of certified payroll for the listed weeks, the forum dismissed the allegation based on the agency's failures to identify the violations correctly in the exhibit or to move to amend the NOI at hearing. ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 201-02 (2013).***

10.0 ANSWER

10.1 --- Generally

❑ An answer must include an admission or denial of each fact alleged in the charging document. A general denial is insufficient. ***---- In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI Orders 253, 258 (2014).***

10.2 --- Evidentiary Significance (*see also* 20.24, 24.3)

❑ Factual matters alleged in a charging document that are not denied in the answer are deemed admitted by the answering party. ***---- In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI Orders 253, 258 (2014).***

❑ In the answer, respondent acknowledged and admitted that wages were due, but did not admit the amount owing. Respondent's admissions established that wages were unpaid and due. ***---- In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI Orders 253, 260 (2014).***

❑ When the facts alleged in the second paragraph of the agency's OOD incorporated all the elements of the agency's prima facie case, respondents' admission of those facts in its answer was proof of those elements. ***---- In the Matter of Giants, Inc., 33 BOLI Orders 53, 56 (2014).***

10.3 --- Affirmative Defense

❑ In a case involving discrimination in public accommodation on the basis of sexual orientation, the forum need not consider a defense of unconstitutionality when respondents did not raise that defense in their answer. ***---- In the Matter of Blachana, LLC, 32 BOLI 220, 249 (2013).***

Appeal pending.

❑ In a hostile environment sexual harassment case, the forum did not consider the affirmative defenses set out in OAR 839-005-0030(5)(b) because respondent failed to plead them in the answer. ***----- In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 168 (2012).***

❑ The forum did not consider the "direct threat" exception in OAR 839-005-0220(2)(c)(C) because it is an affirmative defense that was waived by respondent's failure to raise it in the answer. ***----- In the Matter of Kenneth Wallstrom, 32 BOLI 63, 78 (2012).***

11.0 NOTICE OF HEARING

12.0 CONSOLIDATION OF CASES (*see* 14.9)

13.0 EXPEDITED HEARINGS

14.0 MOTIONS

14.1 --- Motion to Postpone (*see* 17.0)

14.2 --- Motion for Summary Judgment (*see* 15.0)

14.3 --- Motion for Discovery Order (*see* 19.0)

14.4 --- Motion for Change of Hearing Location

14.5 --- Motion to Dismiss

14.6 --- Motion to Strike

14.7 --- Motion for Telephonic Hearing

14.8 --- Motion for Protective Order

❑ Prior to hearing, the agency filed three motions for *in camera* review and corresponding protective orders related to complainant's medical records sought through informal discovery by respondent. The ALJ granted all three motions and issued appropriate protective orders. ***---- In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI Orders 1, 4 (2014).***

❑ During the hearing, the ALJ required an individual respondent who was not designated as a "qualified person" under the ALJ's protective order to read the protective order and sign a statement agreeing to be bound by the terms of that order as a prerequisite to being allowed to read any of complainant's medical records proffered as evidence. ***----- In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 101 (2012).***

❑ The agency moved for a protective order regarding complainant's medical information and records in response to respondents' informal discovery request in which respondents requested complainant's medical records related to complainant's claim for damages for emotional distress or mental or physical suffering. The agency attached four pages of medical records for the ALJ's review and asked that the ALJ conduct an *in camera* review of all documents provided by the agency

prior to their release to respondents to determine if the agency was required to release them to respondents. In response, the ALJ issued a protective order governing the use and disposition of complainant's medical records and testimony at hearing related to those records. Based on the submitted records' immediate proximity in time to the alleged unlawful actions and a specific reference to complainant's former employment with respondent, the ALJ found that the records likely contained information generally relevant to the issue of complainant's entitlement to damages for emotional, mental, and physical suffering. However, because the agency did not specifically ask that the ALJ release these records to respondents and respondents had not filed a motion for discovery order, the ALJ declined to release the records to respondents, finding that any such release remained within the agency's discretion. ***----- In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 97 (2012).***

14.9 --- Motion to Consolidate

14.10 --- Motion for Extension of Time

❑ When exceptions to proposed order did not timely arrive at the office of the Contested Case Coordinator, apparently because they were mailed to wrong address, and the mailing also had insufficient postage, the agency's motion to extend the time for filing was denied. ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 189 (2013).***

14.11 --- Generally

❑ After the ALJ's opening statements and after the ALJ declared CSRT to be in default, the Agency's administrative prosecutor asked the ALJ to apply the provisions of OAR 839-005-0330(1) & (2) by accepting the pleadings and the agency's case summary as the record of the case and issuing a Final Order on Default. This was the first case in which the agency asked the forum to apply this rule. After the ALJ explained the problems he saw in interpreting the rule, the agency elected to withdraw its request and proceeded to call witnesses listed in its case summary and offer the agency exhibits filed with its case summary. ***---- In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI Orders 263, 265-66 (2014).***

❑ Respondent filed a motion to take complainant's deposition, a motion in limine to allow and/or exclude evidence, and third motion to postpone the hearing a second time. The agency filed objections to all three motions. The ALJ denied all three of respondent's motions. ***---- In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI Orders 1, 4 (2014).***

❑ The ALJ denied respondent's motion to have the hearing reported by an official court reporter and issued an order that stated, in pertinent part: "The forum's audio recording will be the official record of the hearing and any transcript made from it will be the official transcript of the hearing. However, with three conditions, respondent is free to bring a court reporter to the hearing if it believes that an accurate and complete record cannot be otherwise obtained. First, respondent bears all responsibility for paying the court reporter. Second, the court reporter is not disruptive of the proceedings. Third, the court reporter must sign a protective agreement confirming that he or she has read the four protective orders issued by the forum and agrees to be bound by them. " ***---- In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI Orders 1, 4-5 (2014).***

15.0 SUMMARY JUDGMENT

❑ Motions for summary judgment are specifically authorized by the Oregon Administrative Rules. A motion may be made to obtain an accelerated decision as to all or part of the issues raised in the pleadings. To the extent granted, the order ruling on the motion is to be set forth in the proposed order. ***---- In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI Orders 253, 257 (2014).***

❑ A motion for summary judgment may be granted when no genuine issue as to any material fact exists and a participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings. The standard for determining if a genuine issue of material fact exists and the evidentiary burden on the participants is as follows -- No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at hearing. ***---- In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI Orders 253, 258 (2014).*** *See also In the Matter of Grant and Leslie Hamilton dba MacGregors, 33 BOLI Orders 209, 213 (2014); In the Matter of Farwest Hatchery LLC, 33 BOLI Orders 176, 179, 183 (2014); In the Matter of Diamond Concrete, Inc., 33 BOLI Orders 68, 72 (2014); In the Matter of Aaron Alexander, 33 BOLI Orders 60, 62-63 (2014); In the Matter of Giants, Inc., 33 BOLI Orders 53, 55 (2014); In the Matter of KC Systems, Inc., 32 BOLI 205, 206 (2013).*

❑ Prior to the hearing, the agency submitted a motion for partial summary judgment. The forum allowed that motion in part in an interim order insofar as it sought a ruling that respondent owed wages to claimant. ***---- In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI Orders 253, 254 (2014).***

❑ The forum granted the agency's motion for summary judgment as to a wage claimant's unpaid, due, and owing wages when respondent's answer did not dispute the agency's allegations in its OOD or contest the exhibits submitted in support of the agency's motion. ***---- In the Matter of Farwest Hatchery LLC, 33 BOLI Orders 176, 180, 184 (2014).***

❑ The forum granted the agency's motion for summary judgment when respondent's answer did not dispute the agency's allegations in its OOD and raised no affirmative defenses. ***---- In the Matter of Aaron Alexander, 33 BOLI Orders 60, 63 (2014).***

❑ In reviewing a motion for summary judgment, this forum draws all inferences of fact from the record against the participant filing the motion for summary judgment and in favor of the participant opposing the

motion. ***---- In the Matter of Farwest Hatchery LLC, 33 BOLI Orders 176, 179 (2014).*** *See also In the Matter of Aaron Alexander, 33 BOLI Orders 60, 63 (2014); Giants, Inc., 33 BOLI Orders 53, 55 (2014); In the Matter of KC Systems, Inc., 32 BOLI 205, 207 (2013).*

❑ The forum granted the agency's motion for summary judgment when respondent either admitted or did not address the agency's allegations in its answer and filed no response to the agency's motion for summary judgment. ***---- In the Matter of Giants, Inc., 33 BOLI Orders 53, 57 (2014).***

❑ When respondent filed a motion for summary judgment after the hearing was concluded, the forum denied the motion, noting that although the forum's rules do not specifically state that a motion for summary judgment must be made prior to the hearing, summary judgment is intended to be a tool to shorten proceedings by eliminating the need for litigation of undisputed material facts, and in this case, respondent's motion was made after all material facts were litigated. ***---- In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI Orders 1, 6 (2014).***

16.0 CLAIM AND ISSUE PRECLUSION

16.1 --- Generally

16.2 --- Claim Preclusion

16.3 --- Issue Preclusion

17.0 POSTPONEMENTS

❑ On February 10, 2014, a state holiday and the day before the hearing was scheduled, respondent's authorized representative telephoned BOLI and left a message requesting a postponement due to inclement weather and her sickness. The ALJ did not learn of this phone call until 6:30 a.m. on February 11, 2014. That same day, at the time set for hearing, the ALJ held a telephone conference with respondent's authorized representative and the agency's administrative prosecutor. At the conclusion of the conference, the ALJ granted the postponement and rescheduled the hearing to begin on March 18, 2014. ***---- In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI Orders 189, 192 (2014).***

❑ Thirteen days before the reset hearing date, an attorney filed a notice of appearance on behalf of respondent and requested a postponement of the hearing based on a previously scheduled conflict consisting of a conciliation meeting with BOLI's Civil Rights Division involving himself, his client, and an out-of-state attorney. The ALJ held a telephone conference with the attorney and administrative prosecutor, at which time the ALJ orally granted respondent's second motion for postponement and reset the hearing to begin on March 25, 2014. ***---- In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI Orders 189, 192 (2014).***

❑ Respondent moved for a postponement based on the illness of respondent's counsel, his legal assistant, his secretary, and an automobile accident that morning involving respondent's Portland terminal manager who was scheduled to assist respondent's counsel with hearing preparation. The Agency did not object and the hearing was reset. ***---- In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI Orders 1, 4 (2014).***

❑ Respondent filed a motion to take complainant's deposition, a motion in limine to allow and/or exclude evidence, and third motion to postpone the hearing a second time. The agency filed objections to all three motions. The ALJ denied all three of respondent's motions. ***---- In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI Orders 1, 4 (2014).***

❑ An unopposed motion to postpone hearing to complete discovery was granted and a mutually agreed-upon hearing date was set. ***---- In the Matter of Blachana, LLC, 32 BOLI 220, 224 (2013).***

Appeal pending.

❑ An unopposed motion to postpone hearing was granted and new case summary due date was set. ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 187 (2013).***

❑ Despite respondents' claim that their attorney had not advised them of the hearing, that they had another legal hearing the same month, and that they were unaware of the hearing until a week prior, the forum denied respondent's request for postponement, finding that the notice of hearing had been mailed to respondent's correct address, there was no evidence respondent had failed to receive the notice, or that respondent had made efforts to find another attorney. ***---- In the Matter of Dan Thomas Construction, Inc., 32 BOLI 174, 176 (2013).***

18.0 INFORMAL DISPOSITIONS, SETTLEMENT (*see also* 25.3)

19.0 DISCOVERY

19.1 --- Generally

❑ After the agency rested its case-in-chief, respondent's attorney requested an opportunity to inspect the original investigative files in both cases. Based on discovery issues that arose during the testimony of the agency investigator, the ALJ granted the request. The agency asked that the ALJ conduct an *in camera* inspection of the files before allowing respondent's attorney to view them, a request that was granted. The ALJ inspected the files, redacting nine documents, and allowed respondent's attorney to inspect the remainder of the investigative files. ***----- In the Matter of Columbia Components, Inc., 32 BOLI 257, 261 (2013).***

❑ When formal charges is based upon a complaint filed pursuant to ORS 659A.825, discovery is the appropriate procedure for ascertaining the identity of the aggrieved persons. ***---- In the Matter of Blachana, LLC, 32 BOLI 220, 223 (2013).***

Appeal pending.

19.2 --- Documents

❑ The ALJ granted respondent's motion for a discovery order to compel the agency to: (a) supplement its answer to respondent's interrogatory inquiring about complainant's alleged emotional, mental and physical suffering; and (b) produce any documents not already produced in response to respondent's earlier

informal request for production seeking "[a]ll notes, correspondence, diaries, calendars, tape recordings, or other writings of any kind with respect to complainant's employment * * *." ***---- In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI Orders 1, 4-6 (2014).***

❑ Respondent moved for a discovery order requiring, among other things, production of a number of documents and that complainant be required to confirm that, if no documents were produced in response to respondent's request for production, no such documents exist and that the agency be prohibited from introducing evidence related to documents that have not been produced. To the extent they had not been produced, the ALJ ordered the agency to produce documents responsive to a number of respondent's requests but declined to grant respondent's motion for an order that if no documents were produced in response to respondent's request for production, no such documents exist and that the agency be prohibited from introducing evidence related to documents that have not been produced, noting that the sanctions in OAR 839-050-0200(11) may apply in these circumstances. ***----- In the Matter of Columbia Components, Inc., 32 BOLI 257, 259-61 (2013).***

❑ The Agency was ordered to provide a copy of the commissioner's complaint filed pursuant to ORS 659A.825 as confirmation that the formal charges were based on a commissioner's complaint. ***---- In the Matter of Blachana, LLC, 32 BOLI 220, 223 (2013).***

Appeal pending.

❑ When respondents moved for a discovery order seeking production of documents, the ALJ ordered the agency to produce any documents responsive to respondents' requests that appeared reasonably likely to produce information generally relevant to the case. ***----- In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 100 (2012).***

❑ When the agency alleged that respondent unlawfully discharged complainant in 2009 and respondent sought production of complainant's tax returns for 2007-2010, the forum ordered the agency to produce complainant's 2009 and 2010 tax returns and stated that the 2007-2008 returns need not be produced because they lacked potential relevance. ***----- In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 100 (2012).***

19.3 --- Interrogatories

❑ The ALJ granted respondent's motion for a discovery order to compel the agency to: (a) supplement its answer to respondent's interrogatory inquiring about complainant's alleged emotional, mental and physical suffering; and (b) produce any documents not already produced in response to respondent's earlier informal request for production seeking "[a]ll notes, correspondence, diaries, calendars, tape recordings, or other writings of any kind with respect to complainant's employment * * *." ***---- In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI Orders 1, 4-6 (2014).***

❑ Respondent moved for a discovery order requiring, among other things, complete and sworn responses to its interrogatories. The agency objected, contending it responded adequately to respondent's informal discovery requests and that respondent's motions were "untimely and made solely for the purposes of delay. The ALJ ordered that complainant verify that the Interrogatory responses, including the references incorporated therein, were true, and that complainant respond to a specific interrogatory request to which the agency had objected. ***----- In the Matter of Columbia Components, Inc., 32 BOLI 257, 259-60 (2013).***

❑ The ALJ concluded that three of Respondents' interrogatories were reasonably likely to produce information generally relevant to the case and ordered the Agency to answer those interrogatories. ***---- In the Matter of Blachana, LLC, 32 BOLI 220, 224 (2013).***

Appeal pending.

❑ When respondents moved for a discovery order seeking more complete responses to respondents' interrogatories, the ALJ ordered the agency to respond to some interrogatories more specifically, but found that other requests were unduly vague and did not require a response. ***----- In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 97-99 (2012).***

19.4 --- Requests for Admissions

19.5 --- Depositions

❑ Respondent filed a motion to take complainant's deposition, a motion in limine to allow and/or exclude evidence, and third motion to postpone the hearing a second time. The agency filed objections to all three motions. The ALJ denied all three of respondent's motions. ***---- In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI Orders 1, 4 (2014).***

❑ When it became clear to the ALJ during a hearing that complainant possessed documents either requested by respondent and/or set out in the ALJ's discovery order that complainant did not provide until respondent was able to ascertain existence of those documents during complainant's testimony and that complainant had not been forthcoming with regard to the existence of those documents, the ALJ adjourned the hearing to allow respondent to take complainant's deposition. The ALJ's order provided that: (1) if respondent did not take the opportunity to take complainant's deposition, respondent would not be allowed to ask any further questions of complainant or her husband at hearing related to the existence and production or non-production of any documents or records sought in respondent's request for production of documents; (2) that respondent was allowed to depose complainant for the sole purpose of ascertaining what records complainant had in her control or possession that were within the scope of the ALJ's discovery order or made relevant by the previous seven days of hearing; (3) the scope of the deposition did not extend to seeking answers to respondent's interrogatories, except as directly related to respondent's request for production of documents; (4) respondent could use the deposition, if necessary, in support of a motion for a discovery order to require production of any newly-ascertained records relevant to respondent's requests for production but not otherwise use the deposition as evidence at the hearing; and (5) respondent was responsible for any costs

associated with conducting the deposition, but respondent and agency must each pay for their own copy of the transcript if a transcript was prepared. ***----- In the Matter of Columbia Components, Inc., 32 BOLI 257, 263-64 (2013).***

❑ Respondent moved for a discovery order requiring, among other things, that respondent be allowed to depose complainant based on the agency's inadequate response to respondent's request for production of documents and complainant's failure to satisfactorily answer interrogatories. The ALJ denied Respondent's motion to depose complainant but ordered the agency to produce additional documents and ordered complainant to answer an additional interrogatory and verify the truth of all her interrogatory answers. ***----- In the Matter of Columbia Components, Inc., 32 BOLI 257, 259-61 (2013).***

❑ When respondents failed to demonstrate that other methods of discovery, including interrogatories, were so inadequate that respondents would be substantially prejudiced by the denial of its motion to depose [the aggrieved persons], the motion was denied. Respondents must first attempt to gain the information via sworn statements through interrogatories. If the agency is uncooperative, or if respondents can demonstrate that the information it has obtained from the interrogatories will substantially prejudice respondents in the absence of a deposition, respondents may renew their motion to depose witnesses. ***---- In the Matter of Blachana, LLC, 32 BOLI 220, 224 (2013).***

Appeal pending.

19.6 --- Public Records

19.7 --- Failure to Produce

❑ In a housing case, respondent produced no records at hearing to prove its version of critical events related to complainant's expulsion from respondent's rental. Since those records were arguably within the power of respondent to produce and would support respondent's defense, the agency argued that respondent's failure to produce them created an inference that respondent's version of the facts was untrue. The forum disagreed for two reasons. First, because there was no evidence that respondent "willfully suppressed" the records, no presumption exists under OEC 311(1)(a) that the records would have been adverse to respondent. Second, it was the agency's burden to prove that respondent's defense was pretextual. If the agency believed that respondent's defense was a pretext, it could have sought these records through discovery and offered them as impeachment or rebuttal evidence or called respondent's replacement tenants as witnesses. Nothing in the record suggested that the agency made any attempt to obtain the records and the agency did not call either replacement tenant as a witness. ***----- In the Matter of Kenneth Wallstrom, 32 BOLI 63, 85-86 (2012).***

❑ Respondent argued that the agency's failure to offer complainant's tax returns as evidence should lead to an inference that complainant's claim for back pay is excessive. The forum disagreed, finding that the agency was under no obligation to offer complainant's tax returns to support its claim for back pay, and its failure to do so, in the absence of a discovery order, did not require the forum to draw any inference whatsoever. If respondent wanted complainant's tax returns in the record, it could have sought them through discovery, then moved for a discovery order that would have been granted, had the agency refused to provide them. ***----- In the Matter of Cyber Center, Inc., 32 BOLI 11, 37 (2012).***

19.8 --- Subpoenas

19.9 --- Case Summaries

❑ Two months after case summaries were due, respondent's authorized representative Schoene filed a case summary listing one witness and 21 exhibits and enclosing copies of the exhibits. That same day, the agency filed a motion to exclude evidence "untimely filed in respondent's case summary." In response, Schoene sent an email to BOLI contested case coordinator in which she explained in detail the reasons why respondent had not file a case summary earlier. The ALJ instructed BOLI's contested case coordinator to contact Schoene and tell her that she would need to ask permission to file a response to the agency's motion by email. Schoene filed such a request, and the ALJ granted her request and retroactively received her e-mailed explanation, then held a prehearing conference and informed the participants that he would rule on the admissibility of respondent's case summary at the start of the hearing. Before opening statements, the ALJ gave Schoene an opportunity to explain why respondent had not timely filed a case summary. After listening to Schoene's numerous excuses, the ALJ determined that Schoene had not provided a satisfactory reason for not timely filing a case summary and that excluding the testimony of Mike Allen, the single witness respondent listed in her case summary, as well as the 21 exhibits provided with respondent's case summary, would not violate the ALJ's duty to conduct the full and fair inquiry required by OAR 839-050-0210(5). The ALJ ruled that respondent's case summary would not be received, noting that respondent's exhibits, although not admissible in her case in chief, could be offered as impeachment exhibits. The ALJ also informed Schoene that she would not be allowed to testify as a witness because she was not a named respondent and, even if respondent's case summary had been admitted, she was not listed on it as a witness. ***---- In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI Orders 189, 193 (2014).***

❑ The agency filed a motion objecting to the admission of any evidence offered by respondents because respondents Bassett did not file case summaries and because respondents MBI and H. Maltby untimely filed their case summary. At hearing, the ALJ found that respondents MBI and H. Maltby provided a satisfactory reason for filing a case summary one day late and ruled that copies of exhibits filed with their case summary could be offered as evidence at hearing. ***---- In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI Orders 121, 129 (2014).***

❑ At hearing, respondent's representative asked to

make a statement, including sworn testimonial evidence. Respondent had not submitted a case summary designating the representative as a witness. The forum allowed the representative to make his statement, reserving its ruling on whether the statement would be allowed as evidence. He stated that he is not a lawyer, did not understand that he needed to disclose himself as a witness in the case summary, and that he had experienced personal problems during the past week. After his statement, the agency's administrative prosecutor did not choose to ask him any questions and did not voice any objection to allowing his testimony. The forum exercised its discretion under OAR 839-050-0210 (5) to admit his statement into evidence. ***----- In the Matter of Zoom Contracting, LLC, 33 BOLI Orders 111, 112 (2014).***

❑ During the hearing, both the agency and respondents moved to offer documents in evidence that should have been included with their case summaries. Neither participant objected and the ALJ received those documents. ***----- In the Matter of High Mountain Plumbing Company and Diana Marie Cina, 33 BOLI Orders 40, 41-42 (2014).***

❑ The agency's objection, on basis of untimeliness, to respondent's filing of amended case summary on the second day of hearing was sustained. ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 188 (2013).***

❑ At hearing, the agency sought to introduce into evidence three letters to complainant from a housing agency describing the respective amounts of rent complainant and the housing agency would pay and HACSA would pay. Respondent objected on the grounds that the agency had not submitted it with the agency's case summary. The ALJ did not receive the exhibit because the agency failed to offer a satisfactory reason for not providing them with the agency's case summary and excluding it would not violate the ALJ's duty to conduct a full and fair inquiry under ORS 183.415(10). The ALJ reserved ruling on the admissibility of A-19 until issuance of the Proposed Order. ***----- In the Matter of Kenneth Wallstrom, 32 BOLI 63, 66 (2012).***

❑ At hearing, the agency sought to introduce into evidence 10 pages of "Progress Note[s]" notes made by complainant's therapist. Respondent objected on the grounds that the agency had not submitted the notes with the agency's case summary. Statements by the agency case presenter and therapist established that: (1) The agency served a subpoena on the therapist for the records two weeks before the hearing; (2) The therapist faxed the records the case presenter seven days before the hearing; (3) Because of a malfunction in the therapist's fax machine, the records were not transmitted to the case presenter; (4) The case presenter first acquired the documents late in the afternoon the day before hearing; and (5) The therapist had little independent recollection of what was specifically discussed in her therapy sessions with complainant. Under these circumstances, the forum finds that the agency has provided a satisfactory reason for not submitting the records with its case summary and that excluding them would violate the ALJ's duty to conduct a full and fair inquiry. ***----- In the Matter of Kenneth Wallstrom, 32 BOLI 63, 66 (2012).***

❑ Respondent, an attorney, did not file a case summary prior to the time set for hearing, but brought her case summary to the hearing. The agency objected to respondent's case summary on the grounds that it was untimely filed. In response to the ALJ's query, respondent stated that she did not file a case summary earlier because the ALJ's interim order requiring case summaries had been misfiled at her office. The ALJ sustained the agency's objection on the grounds that respondent failed to offer a satisfactory reason for having failed to timely file her case summary and that excluding it would not violate that ALJ's duty to conduct a full and fair inquiry under ORS 183.415(10). ***----- In the Matter of Susan C. Steves, 32 BOLI 43, 48 (2012).***

❑ On her case summary, respondent listed Dirk Sharp as a witness. Based on the agency's objection and respondent's failure to timely file a case summary, the ALJ did not allow Sharp to testify but did allow respondent to make an oral offer of proof regarding what Sharp's testimony would have been, had he been allowed to testify. ***----- In the Matter of Susan C. Steves, 32 BOLI 43, 48 (2012).***

19.10 --- Medical Records (*see also* 14.8)

❑ Prior to hearing, the agency filed three motions for *in camera* review and corresponding protective orders related to complainant's medical records sought through informal discovery by respondent. The ALJ granted all three motions and issued appropriate protective orders. ***---- In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI Orders 1, 4 (2014).***

❑ The ALJ issued protective orders related to the release of aggrieved persons' medical records by the agency to respondents. ***---- In the Matter of Blachana, LLC, 32 BOLI 220, 225 (2013.)***

Appeal pending.

❑ When the agency alleged that respondent unlawfully discharged complainant in 2009 and respondent sought production of complainant's medical records from 2004 through December 2011, the ALJ ordered the agency and complainant to produce all medical records from January 1, 2007, to the present that reflected any treatment for any condition similar to or the same as the specific emotional, mental and physical distress complainant alleges she experienced as a result of respondents' alleged unlawful conduct, including the medical records earlier provided to the forum by the agency for an *in camera* inspection pursuant to its motion for a protective order. ***----- In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 100 (2012).***

19.11 --- Protective Order

❑ Prior to hearing, the agency filed three motions for *in camera* review and corresponding protective orders related to complainant's medical records sought through informal discovery by respondent. The ALJ granted all three motions and issued appropriate protective orders. ***---- In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI Orders 1, 4 (2014).***

❑ In a civil rights case, the ALJ issued a protective

order that allowed respondents' attorney to have the legal names of all the aggrieved persons, but prohibited respondents' attorney from disseminating those legal names except under specific conditions set out in the protective order. To a limited extent, the order also restricted the conditions under which the five legal names of aggrieved persons that had already been disclosed could be used in discovery. ***---- In the Matter of Blachana, LLC, 32 BOLI 220, 224 (2013).***

Appeal pending.

20.0 EVIDENCE

20.1 --- Generally

❑ Allegations that were not supported by any evidence were dismissed. ***----- In the Matter of Green Thumb Landscape and Maintenance, 32 BOLI 185, 196 (2013).***

❑ Defenses supported by no credible evidence at hearing were rejected by the forum. ***----- In the Matter of Dan Thomas Construction, Inc., 32 BOLI 174, 181 (2013).***

20.2 --- Admissibility

❑ As an offer of proof against the agency's objection, respondent elicited testimony from complainant concerning a claim against Tyson Construction, a company formerly owned by complainant, to show that complainant had previously committed fraud. The agency's objection was sustained on the grounds that, in the case at hand any evidence of past fraud constituted inadmissible character evidence. ***----- In the Matter of Columbia Components, Inc., 32 BOLI 257, 266 (2013).***

❑ When respondent moved to admit a copy of handwritten notes made by the agency case presenter initially assigned to the case while interviewing complainant, a document that was inadvertently provided to respondent in response to respondent's interrogatories, the forum found that the agency did not waive its work product privilege and that the notes were inadmissible. ***----- In the Matter of Columbia Components, Inc., 32 BOLI 257, 265 (2013).***

20.3 --- Admissions (*see also* 10.2)

❑ Respondent's failure to deny the allegation that claimant's hourly wage was $14.00 per hour constituted an admission of that fact. ***---- In the Matter of Farwest Hatchery LLC, 33 BOLI Orders 176, 185 (2014).***

❑ Respondent's failure to address the written notice component concerning penalty wages in the agency's OOD was an admission that the written notice was in fact submitted as alleged. ***---- In the Matter of Farwest Hatchery LLC, 33 BOLI Orders 176, 181, 185 (2014).***

❑ When respondent's answer did not dispute the agency's allegations in its OOD or contest the exhibits submitted in support of the agency's motion, the forum viewed respondent's non-denial as an admission of the allegations in the OOD. ***---- In the Matter of Farwest Hatchery LLC, 33 BOLI Orders 176, 180 (2014).***

❑ When the facts alleged in the second paragraph of the agency's OOD incorporated all the elements of the agency's prima facie case, respondents' admission of those facts in its answer was proof of those elements. ***---- In the Matter of Giants, Inc., 33 BOLI Orders 53, 56 (2014).***

❑ An employee's two time cards showing work for 6.5 hours and "no lunch", together with WH-38s showing payment to that employee for 6.5 hours on each occasion constitutes a tacit admission the employee worked without the meal period required by OAR 839-020-0050, and the forum found two violations. ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 203 (2013).***

❑ When respondent admitted underpaying its workers on a project over several weekly pay periods, and its records listed four of the claimants as having worked on the project during those pay periods, the forum found four violations of prevailing wage laws. ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 199-200 (2013).***

❑ In its order of determination, the agency alleged that respondent employed claimant. Respondent did not deny this in its answer and the agency's allegation was therefore deemed admitted. ***----- In the Matter of E. H. Glaab, General Contractor, Inc., 32 BOLI 57, 61 (2012).***

20.4 --- Affidavits

20.5 --- Confidential Business Records

20.6 --- Credibility (*see also* 22.0)

❑ Anomalies within exhibits and between exhibits and testimony raise questions as to reliability. ***----- In the Matter of Bruce Crisman, dba Nu West Painting Contractors*, 32 BOLI 209, 214-16 (2013)**

❑ A claim supported by testimony that was disjointed, confusing, contradictory and at times, simply unbelievable, was dismissed by the forum. ***----- In the Matter of Dan Thomas Construction, Inc., 32 BOLI 174, 182 (2013).***

20.7 --- Cross Examination

20.8 --- Direct Evidence

❑ Direct evidence is evidence that proves a fact in dispute directly, without any inferences or presumptions, and which in itself, if true, conclusively establishes the fact. ***----- In the Matter of Kenneth Wallstrom, 32 BOLI 63, 84 (2012).***

20.9 --- Exclusion (*see also* 19.7, 22.4)

❑ Two months after case summaries were due, respondent's authorized representative Schoene filed a case summary listing one witness and 21 exhibits and enclosing copies of the exhibits. That same day, the agency filed a motion to exclude evidence "untimely filed in respondent's case summary." In response, Schoene sent an email to BOLI contested case coordinator in which she explained in detail the reasons why respondent had not file a case summary earlier. The ALJ instructed BOLI's contested case coordinator to contact Schoene and tell her that she would need to ask permission to file a response to the agency's motion by email. Schoene filed such a request, and the ALJ granted her request and retroactively received her e-

mailed explanation, then held a prehearing conference and informed the participants that he would rule on the admissibility of respondent's case summary at the start of the hearing. Before opening statements, the ALJ gave Schoene an opportunity to explain why respondent had not timely filed a case summary. After listening to Schoene's numerous excuses, the ALJ determined that Schoene had not provided a satisfactory reason for not timely filing a case summary and that excluding the testimony of Mike Allen, the single witness respondent listed in her case summary, as well as the 21 exhibits provided with respondent's case summary, would not violate the ALJ's duty to conduct the full and fair inquiry required by OAR 839-050-0210(5). The ALJ ruled that respondent's case summary would not be received, noting that respondent's exhibits, although not admissible in her case in chief, could be offered as impeachment exhibits. The ALJ also informed Schoene that she would not be allowed to testify as a witness because she was not a named respondent and, even if respondent's case summary had been admitted, she was not listed on it as a witness. ***---- In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI Orders 189, 193 (2014).***

❑ At hearing, the agency sought to introduce into evidence three letters to complainant from a housing agency describing the respective amounts of rent complainant and the housing agency would pay and HACSA would pay. Respondent objected on the grounds that the agency had not submitted it with the agency's case summary. The ALJ did not receive the exhibit because the agency failed to offer a satisfactory reason for not providing them with the agency's case summary and excluding it would not violate the ALJ's duty to conduct a full and fair inquiry under ORS 183.415(10).also offered Exhibits A-19 and A-20 as part of its case in chief. Respondent objected to their admission on the grounds that neither had been submitted with the Agency's case summary. The ALJ reserved ruling on the admissibility of A-19 until issuance of the Proposed Order. ***----- In the Matter of Kenneth Wallstrom, 32 BOLI 63, 66 (2012).***

❑ At hearing, the agency sought to introduce into evidence 10 pages of "Progress Note[s]" notes made by complainant's therapist. Respondent objected on the grounds that the agency had not submitted the notes with the agency's case summary. Statements by the agency case presenter and therapist established that: (1) The agency served a subpoena on the therapist for the records two weeks before the hearing; (2) The therapist faxed the records the case presenter seven days before the hearing; (3) Because of a malfunction in the therapist's fax machine, the records were not transmitted to the case presenter; (4) The case presenter first acquired the documents late in the afternoon the day before hearing; and (5) The therapist had little independent recollection of what was specifically discussed in her therapy sessions with complainant. Under these circumstances, the forum finds that the agency has provided a satisfactory reason for not submitting the records with its case summary and that excluding them would violate the ALJ's duty to conduct a full and fair inquiry. ***----- In the Matter of Kenneth Wallstrom, 32 BOLI 63, 66 (2012).***

❑ Respondent, an attorney, did not file a case summary prior to the time set for hearing, but brought her case summary to the hearing. The agency objected to respondent's case summary on the grounds that it was untimely filed. In response to the ALJ's query, respondent stated that she did not file a case summary earlier because the ALJ's interim order requiring case summaries had been misfiled at her office. The ALJ sustained the agency's objection on the grounds that respondent failed to offer a satisfactory reason for having failed to timely file her case summary and that excluding it would not violate that ALJ's duty to conduct a full and fair inquiry under ORS 183.415(10). ***----- In the Matter of Susan C. Steves, 32 BOLI 46, 49-50 (2012).***

❑ On her case summary, respondent listed Dirk Sharp as a witness. Based on the agency's objection and respondent's failure to timely file a case summary, the ALJ did not allow Sharp to testify but did allow respondent to make an oral offer of proof regarding what Sharp's testimony would have been, had he been allowed to testify. ***----- In the Matter of Susan C. Steves, 32 BOLI 43, 48 (2012).***

20.10 --- Failure to Produce

❑ In a housing case, respondent produced no records at hearing to prove its version of critical events related to complainant's expulsion from respondent's rental. Since those records were arguably within the power of respondent to produce and would support respondent's defense, the agency argued that respondent's failure to produce them created an inference that respondent's version of the facts was untrue. The forum disagreed for two reasons. First, because there was no evidence that respondent "willfully suppressed" the records, no presumption exists under OEC 311(1)(a) that the records would have been adverse to respondent. Second, it was the agency's burden to prove that respondent's defense was pretextual. If the agency believed that respondent's defense was a pretext, it could have sought these records through discovery and offered them as impeachment or rebuttal evidence or called respondent's replacement tenants as witnesses. Nothing in the record suggested that the agency made any attempt to obtain the records and the agency did not call either replacement tenant as a witness. ***----- In the Matter of Kenneth Wallstrom, 32 BOLI 63, 85-86 (2012).***

❑ Respondent argued that the agency's failure to offer complainant's tax returns as evidence should lead to an inference that complainant's claim for back pay is excessive. The forum disagreed, finding that the agency was under no obligation to offer complainant's tax returns to support its claim for back pay, and its failure to do so, in the absence of a discovery order, did not require the forum to draw any inference whatsoever. If respondent wanted complainant's tax returns in the record, it could have sought them through discovery, then moved for a discovery order that would have been granted, had the agency refused to provide them. ***----- In the Matter of Cyber Center, Inc., 32 BOLI 11, 37 (2012).***

20.11 --- Habit, Routine Practice

20.12 --- Hearsay

20.13 --- Inferences

❑ When the law imposes on the employer the burden of keeping track of what work was performed for what periods of time and by which employees and when the evidence is that the employer has not met this obligation, the fact-finder can draw reasonable inferences about the work performed, including the hours spent performing various tasks. Making such an inference is not, as respondent asserted, pure speculation. This has long been the law. ***---- In the Matter of Hard Rock Concrete, Inc., 33 BOLI Orders 77, 108 (2014).***

❑ In a housing case, respondent produced no records at hearing to prove its version of critical events related to complainant's expulsion from respondent's rental. Since those records were arguably within the power of respondent to produce and would support respondent's defense, the agency argued that respondent's failure to produce them created an inference that respondent's version of the facts was untrue. The forum disagreed for two reasons. First, because there was no evidence that respondent "willfully suppressed" the records, no presumption exists under OEC 311(1)(a) that the records would have been adverse to respondent. Second, it was the agency's burden to prove that respondent's defense was pretextual. If the agency believed that respondent's defense was a pretext, it could have sought these records through discovery and offered them as impeachment or rebuttal evidence or called respondent's replacement tenants as witnesses. Nothing in the record suggested that the agency made any attempt to obtain the records and the agency did not call either replacement tenant as a witness. ***----- In the Matter of Kenneth Wallstrom, 32 BOLI 63, 85-86 (2012).***

❑ In a housing case, the agency established that respondent's intent was that he did not want to let complainant have a dog. Complainant reacted by becoming upset and having trouble sleeping for a night and testified that she took respondent's denial of her request for a dog "as a threat," but did not testify as to why she took it as a threat, as opposed to a mere denial of her request to have a dog. There was no evidence concerning respondent's body language or manner of speech when he denied complainant's request that could indicate the words were intended to coerce, intimidate, or threaten complainant and no testimony that respondent took any action related to his statement, or that complainant refrained from getting a dog because she feared repercussions from respondent. Although the fact that complainant did not get a dog while she continued to live in the subject property leads to a possible inference that she did not do so because of respondent's statement and her resultant fear, the forum declined to draw that inference because of the lack of other supporting evidence. Based on the above, the forum concluded that the evidence is insufficient to show that respondent's statement violated ORS 659A.145(8). ***----- In the Matter of Kenneth Wallstrom, 32 BOLI 63, 81 (2012).***

❑ Respondent argued that the agency's failure to offer complainant's tax returns as evidence should lead to an inference that complainant's claim for back pay is excessive. The forum disagreed, finding that the agency was under no obligation to offer complainant's tax returns to support its claim for back pay, and its failure to do so, in the absence of a discovery order, did not require the forum to draw any inference whatsoever. If respondent wanted complainant's tax returns in the record, it could have sought them through discovery, then moved for a discovery order that would have been granted, had the agency refused to provide them. ***----- In the Matter of Cyber Center, Inc., 32 BOLI 11, 37 (2012).***

20.14 --- Inspection of Documents Referred to During Testimony

20.15 --- Judicial & Official Notice

❑ Respondent filed a motion requesting the forum to take official notice of an ongoing federal district court proceeding "addressing the lawfulness of [respondent's] medical note procedure" and a "filing by complainant * * * in that federal court proceeding." The agency filed a response to respondent's motion in which it attached additional documents related to the federal court proceeding "in order for the forum to have a complete record." The forum granted respondent's motion and also took official notice of the documents filed by the agency. ***---- In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI Orders 1, 6 (2014).***

❑ The Forum took judicial notice of a standard calendar for the years 2011 and 2012. ***----- In the Matter of Bruce Crisman, dba Nu West Painting Contractors, 32 BOLI 209, 211 (2013).***

❑ The forum took official notice of the massive stock market crash in 2008-2009. ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 198 (2013).***

20.16 --- Objections

❑ When respondent moved to admit a copy of handwritten notes made by the agency case presenter initially assigned to the case while interviewing complainant, a document that was inadvertently provided to respondent in response to respondent's interrogatories, the forum found that the agency did not waive its work product privilege and that the notes were inadmissible. ***----- In the Matter of Columbia Components, Inc., 32 BOLI 257, 265 (2013).***

20.17 --- On-site Visits by ALJ

❑ The ALJ temporarily adjourned the hearing to visit the ranch where six complainants had been employed and where the alleged discrimination had occurred, accompanied by all respondents, respondents' counsel, the agency administrative prosecutor, the Oregon state trooper assigned to provide security at the hearing, and the forum's two interpreters. ***---- In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI Orders 121, 130 (2014).***

20.18 --- Photographs

❑ When exhibits in the agency's case summary that were black and white copies of color photographs taken by the complainant in respondents' office contained partially illegible text, the ALJ requested the agency to provide the original color photographs on which the text

could clearly be read. The ALJ ordered the agency to either substitute the original photographs for the copies provided in its case summary or to provide equally legible color copies. The agency chose the latter option and the ALJ substituted the color copies for the black and white copies provided in the agency's case summary. ***----- In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 101 (2012).***

20.19 --- Presumptions

❑ The forum applied the presumption in ORS 40.135(1)(g) providing that "A person is the owner of property from exercising acts of ownership over it or from common reputation of the ownership of the person." ***----- In the Matter of Zoom Contracting, LLC, 33 BOLI Orders 111, 119 (2014).***

❑ In a housing case, respondent produced no records at hearing to prove its version of critical events related to complainant's expulsion from respondent's rental. Since those records were arguably within the power of respondent to produce and would support respondent's defense, the agency argued that respondent's failure to produce them created an inference that respondent's version of the facts was untrue. The forum disagreed, in part because there was no evidence that respondent "willfully suppressed" the records so as to create a presumption under OEC 311(1)(a) that the records would have been adverse to respondent. ***----- In the Matter of Kenneth Wallstrom, 32 BOLI 63, 85 (2012).***

20.20 --- Privileges

20.21 --- Rebuttal and Impeachment

❑ As "impeachment" evidence, respondent offered an exhibit that it did not provide with its case summary that showed complainant used the e-mail signature of dee@columbiacomponents.com during her employment with respondent. The agency objected on the grounds that the exhibit was not provided with respondent's case summary and that it was not impeachment evidence. The agency's objection was sustained on both grounds. Earlier in the hearing, complainant testified during respondent's cross examination that she created and used that e-mail address, so the exhibit impeached nothing but merely affirmed what complainant previously testified to. ***----- In the Matter of Columbia Components, Inc., 32 BOLI 257, 265 (2013).***

20.22 --- Relevancy

❑ The Agency's objection to testimony concerning whether the witness had ever observed respondent exhibiting bias towards people in the "LGBT community" was sustained after an offer of proof, on the grounds that it was character evidence. ***---- In the Matter of Blachana, LLC, 32 BOLI 220, 226 (2013).***

20.23 --- Reliability

20.24 --- Stipulations

20.25 --- Sufficiency

❑ Testimony of each claimant that he was employed, corroborated by exhibits and by respondent's failure to dispute the employment, despite making other responses to the wage claims, were sufficient to establish employment relationship, and rate of pay. ***----- In the Matter of Bruce Crisman, dba Nu West Painting Contractors*, 32 BOLI 209, 214 (2013).**

❑ When respondent admitted underpaying its workers on a project over several weekly pay periods, and its records listed four of the claimants as having worked on the project during those pay periods, the forum found four violations of prevailing wage laws. ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 199-200 (2013).***

❑ When respondent admitted underpaying its workers on a project over several weekly pay periods, but there was no evidence that the first worker was employed on the project during the applicable pay periods, and the only evidence of the second worker's employment was a statement to that effect in a letter from the agency's compliance specialist to the respondent together with the respondent's subsequent payment to that worker of $22.40, the forum did not find any violations regarding payment of prevailing wages to either of the two workers. ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 199-200 (2013).***

❑ Respondent argued that the agency's failure to offer complainant's tax returns as evidence should lead to an inference that complainant's claim for back pay is excessive. The forum disagreed, finding that the agency was under no obligation to offer complainant's tax returns to support its claim for back pay, and its failure to do so, in the absence of a discovery order, did not require the forum to draw any inference whatsoever. If respondent wanted complainant's tax returns in the record, it could have sought them through discovery, then moved for a discovery order that would have been granted, had the agency refused to provide them. ***----- In the Matter of Cyber Center, Inc., 32 BOLI 11, 37 (2012).***

20.26 --- Witnesses (*see also* 22.0)

❑ At hearing, respondent's representative asked to make a statement, including sworn testimonial evidence. Respondent had not submitted a case summary designating the representative as a witness. The forum allowed the representative to make his statement, reserving its ruling on whether the statement would be allowed as evidence. He stated that he is not a lawyer, did not understand that he needed to disclose himself as a witness in the case summary, and that he had experienced personal problems during the past week. After his statement, the agency's administrative prosecutor did not choose to ask him any questions and did not voice any objection to allowing his testimony. The forum exercised its discretion under OAR 839-050-0210 (5) to admit his statement into evidence. ***----- In the Matter of Zoom Contracting, LLC, 33 BOLI Orders 111, 112 (2014).***

20.27 --- Unsworn Statements (*see also* 10.2, 24.3)

20.28 --- Evidence Requested by Forum (*see also* 2.1)

❑ After the ALJ's opening statements and after the ALJ declared CSRT to be in default, the Agency's administrative prosecutor asked the ALJ to apply the

provisions of OAR 839-005-0330(1) & (2) by accepting the pleadings and the Agency's case summary as the record of the case and issuing a Final Order on Default. This was the first case in which the Agency has asked the forum to apply this rule. After the ALJ explained the problems he saw in interpreting the rule, the Agency elected to withdraw its request and proceeded to call witnesses listed in its case summary and offer the Agency exhibits filed with its case summary. ***---- In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI Orders 263, 265-66 (2014).***

❑ After the hearing, the ALJ re-opened the record on his own motion to obtain a copy of claimant's original 2009-2010 nail salon appointment books for inspection. After inspecting the books, the ALJ copied two pages that appeared to contain inconsistencies with the claimant's 2009-2010 calendars received at hearing and marked and received them into the record. Copies were provided to both participants and the original books mailed back to the claimant, with instructions to claimant to retain them until such time as the case was completely resolved and all appeal rights had expired. ***---- In the Matter of Susan C. Steves, 32 BOLI 43, 48-49 (2012).***

❑ After the hearing, the ALJ issued an interim order reopening the record and requiring respondents to provide copies of time records for respondent's employees that were not offered at hearing. Respondents filed a motion for clarification of the reason for the ALJ's interim order, arguing that it was improper under OAR 839-050-0410 for the ALJ to reopen the record to obtain this evidence if the purpose was to allow additional evidence relating to complainant's lost income because it was the agency's burden to establish complainant's damages at hearing, the agency could have requested these time records from respondent and offered them at hearing, and the agency did not do so. In response, the ALJ issued an interim order retracting the order. ***----- In the Matter of Cyber Center, Inc., 32 BOLI 11, 14 (2012).***

21.0 PROOF

21.1 --- Generally

❑ The forum found no violation of requirements to keep or provide records under OAR 839-020-0080 or 839-020-0083, when the agency's notice of intent failed to identify any records that respondents were required to keep and failed to keep, and no evidence was presented at the hearing to assist the forum in identifying how respondents were deficient. ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 198-99 (2013).***

21.2 --- Standard of Proof

❑ The Agency has the burden of proof to establish the causal link in a civil rights case and the standard of proof is a preponderance of the evidence. ***----- In the Matter of Kenneth Wallstrom, 32 BOLI 63, 82-83 (2012).***

21.3 --- Burden of Proof

21.3.1 --- Generally

21.3.2 --- Wage & Hour Cases

❑ In a wage claim default case, the agency needs only to establish a prima facie case supporting the allegations of its OOD in order to prevail. The elements of the agency's prima facie case were: 1) Respondent employed claimant; 2) The pay rate upon which respondent and claimant agreed, if other than the minimum wage; 3) The amount and extent of work claimant performed for respondent; and 4) Claimant performed work for which she was not properly compensated. ***---- In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI Orders 253, 260 (2014).*** *See also In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI Orders 263, 268 (2014).*

❑ In a wage case, it is primarily the employer's responsibility to keep records of the actual hours worked each pay period by each employee. At hearing, it is the employee's responsibility merely to show the amount and extent of work done as a matter of just and reasonable inference; once that is done, the burden shifts to the employer to show the precise amount of work or to negate the showing of the employee. If the employer fails to produce such evidence, wages may be awarded to the employee, even though the award is approximate***. ----- In the Matter of Bruce Crisman, dba Nu West Painting Contractors*, 32 BOLI 209, 215 (2013).**

21.3.3 --- Civil Rights Cases

❑ The Agency has the burden of proof to establish the causal link in a civil rights case and the standard of proof is a preponderance of the evidence. ***----- In the Matter of Kenneth Wallstrom, 32 BOLI 63, 82-83 (2012).***

21.3.3 --- Prevailing Wage Cases

❑ In a prevailing wage case, when the evidence was that the employer paid an ascertained amount of money to a 401(k) plan, the stock market had crashed while the claimant's funds were invested in the account, the crash was of a severity that could explain the difference between the amount paid in and the ultimate payout, and neither the agency nor the employer could demonstrate what happened to the particular funds credited to the claimant's account, the agency failed to satisfy its burden to prove that the employer did not pay all of the claimant's deducted fringe benefits into the 401(k) plan. ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 198 (2013).***

21.4 --- Burden of Production

21.5 --- Mitigation

21.6 --- Civil Rights Cases, Generally

21.7 --- Wage & Hour Cases, Generally

21.8 --- Affirmative Defenses

21.8.1 --- Generally

❑ The words, "the employer has the burden to show", in OAR 839-020-0050(3), make it clear that respondent has the burden to prove the applicability of any exceptions to the requirement to provide a meal period. ***---- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 203 (2013).***

21.8.2 --- Financial Inability to Pay Wages (see Ch. IX, sec. 13.1.6)

21.8.3 --- Civil Rights Cases (see Ch. III, sec. 80-98)

❑ In a civil rights case, a respondent has the burden of proving that a complainant failed to mitigate his or her damages. ***----- In the Matter of Cyber Center, Inc., 32 BOLI 11, 39 (2012).***

21.9 --- Offers of Proof

❑ As an offer of proof against the agency's objection, respondent elicited testimony from complainant concerning a claim against Tyson Construction, a company formerly owned by complainant, to show that complainant had previously committed fraud. The agency's objection was sustained on the grounds that, in the case at hand any evidence of past fraud constituted inadmissible character evidence. ***----- In the Matter of Columbia Components, Inc., 32 BOLI 257, 266 (2013).***

❑ On her case summary, respondent listed Dirk Sharp as a witness. Based on the agency's objection and respondent's failure to timely file a case summary, the ALJ did not allow Sharp to testify but did allow respondent to make an oral offer of proof regarding what Sharp's testimony would have been, had he been allowed to testify. ***----- In the Matter of Susan C. Steves, 32 BOLI 43, 48 (2012).***

22.0 WITNESSES

22.1 --- Generally

22.2 --- Credibility

22.2.1 --- Generally

❑ In a civil rights case, when all the aggrieved persons listened to the voice mails that formed the basis of the violations, their testimony concerning why they felt excluded from the respondents' business was based primarily on their reaction to those voice mails, even though they may have been previously exposed to the thoughts and interpretation of the voice-mails by one of the aggrieved persons. ***----- In the Matter of Blachana, LLC, 32 BOLI 220, 255 (2013).***

Appeal pending.

❑ A claim supported by testimony that was disjointed, confusing, contradictory and at times, simply unbelievable, was dismissed by the forum. ***----- In the Matter of Dan Thomas Construction, Inc., 32 BOLI 174, 182 (2013).***

22.2.2 --- ALJ's Credibility Findings

22.2.3 --- Prior Convictions

22.3 --- Cross-Examination

22.4 --- Exclusion (*see also* 20.9)

❑ Two months after case summaries were due, respondent's authorized representative Schoene filed a case summary listing one witness and 21 exhibits and enclosing copies of the exhibits. That same day, the agency filed a motion to exclude evidence "untimely filed in respondent's case summary." In response, Schoene sent an email to BOLI contested case coordinator in which she explained in detail the reasons why respondent had not file a case summary earlier. The ALJ instructed BOLI's contested case coordinator to contact Schoene and tell her that she would need to ask permission to file a response to the agency's motion by email. Schoene filed such a request, and the ALJ granted her request and retroactively received her e-mailed explanation, then held a prehearing conference and informed the participants that he would rule on the admissibility of respondent's case summary at the start of the hearing. Before opening statements, the ALJ gave Schoene an opportunity to explain why respondent had not timely filed a case summary. After listening to Schoene's numerous excuses, the ALJ determined that Schoene had not provided a satisfactory reason for not timely filing a case summary and that excluding the testimony of Mike Allen, the single witness respondent listed in her case summary, as well as the 21 exhibits provided with respondent's case summary, would not violate the ALJ's duty to conduct the full and fair inquiry required by OAR 839-050-0210(5). The ALJ ruled that respondent's case summary would not be received, noting that respondent's exhibits, although not admissible in her case in chief, could be offered as impeachment exhibits. The ALJ also informed Schoene that she would not be allowed to testify as a witness because she was not a named respondent and, even if respondent's case summary had been admitted, she was not listed on it as a witness. ***---- In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI Orders 189, 193 (2014).***

❑ At hearing, respondent's representative asked to make a statement, including sworn testimonial evidence. Respondent had not submitted a case summary designating the representative as a witness. The forum allowed the representative to make his statement, reserving its ruling on whether the statement would be allowed as evidence. He stated that he is not a lawyer, did not understand that he needed to disclose himself as a witness in the case summary, and that he had experienced personal problems during the past week. After his statement, the agency's administrative prosecutor did not choose to ask him any questions and did not voice any objection to allowing his testimony. The forum exercised its discretion under OAR 839-050-0210 (5) to admit his statement into evidence. ***----- In the Matter of Zoom Contracting, LLC, 33 BOLI Orders 111, 112 (2014).***

❑ In a civil rights case, the ALJ ordered that all witnesses, including aggrieved persons, but not including a respondent and the commissioner, would be excluded from the hearing except while testifying. ***---- In the Matter of Blachana, LLC, 32 BOLI 220, 225 (2013).***

Appeal pending.

22.5 --- Expert Witnesses

❑ In a civil rights case, an expert was allowed to testify as to the difficulties experienced by lesbian, gay, bisexual, and transgender people gathering safely in public places and the physical and emotional damages that lesbian, gay, bisexual and transgender people generally experience, based on the ALJ's determination that such testimony might help the ALJ understand the evidence. Respondents objected to the testimony and

were granted a continuing objection. ***---- In the Matter of Blachana, LLC, 32 BOLI 220, 226 (2013).***

Appeal pending.

❑ In a civil rights case, an expert's testimony was allowed because it was relevant and helpful to the forum to provide context for the issues transgendered persons face in today's society. Moreover, the expert's testimony was not unfairly prejudicial because the forum did not rely on it in making a determination that Respondents engaged in an unlawful practice or in assessing damages. ***---- In the Matter of Blachana, LLC, 32 BOLI 220, 255 (2013).***

Appeal pending.

22.6 --- Failure to Testify (*see also* 20.10)

22.7 --- Interpreters (*see also* 23.0)

22.8 --- Witness Tampering

22.9 --- Telephone Witnesses

22.10 --- Confidentiality

22.11 --- Other

23.0 INTERPRETERS

24.0 DEFAULTS

24.1 --- Generally

❑ At the hearing, the agency moved for an order finding respondent to be in default. Because respondent never appeared at the hearing, she was found to be in default. ***---- In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI Orders 253, 254 (2014).***

❑ At the time set for hearing, neither Respondent CSRT nor Respondent Sabo had made an appearance. The ALJ went on the record and stated that Respondents would be held in default if they did not make an appearance within 30 minutes. By 10 a.m., neither Respondent CSRT nor Respondent Sabo had appeared, and the ALJ commenced the hearing by declaring CSRT in default and explaining the issues involved in the hearing, the matters to be proved, and the procedures governing the conduct of the hearing. ***---- In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI Orders 263, 265 (2014).***

❑ After the ALJ's opening statements and after the ALJ declared CSRT to be in default, the Agency's administrative prosecutor asked the ALJ to apply the provisions of OAR 839-005-0330(1) & (2) by accepting the pleadings and the Agency's case summary as the record of the case and issuing a Final Order on Default. This was the first case in which the Agency has asked the forum to apply this rule. After the ALJ explained the problems he saw in interpreting the rule, the Agency elected to withdraw its request and proceeded to call witnesses listed in its case summary and offer the Agency exhibits filed with its case summary. ***---- In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI Orders 263, 265-66 (2014).***

❑ The agency filed a motion for default against respondent L. Bassett on the grounds that his answer did not include an admission or denial of the factual matters alleged in the Agency's formal charges and did not state a relevant defense to the allegations. The forum denied the agency's motion, stating that "although L. Bassett's answer may not appear in 'pleading format,' it is clear that a number of his responses, whether denial of the facts, denial of knowledge of the circumstances described by the allegation, or explanation, are tailored to specific paragraphs in the formal charges and are intended as a response to the specific allegations in those paragraphs. Other statements included in his narrative response respond specifically or generally to allegations in the formal charges without numeric reference to a specific paragraph in the formal charges. Although L. Bassett's answer may not have responded to all the allegations in the formal charges, OAR 839-050-0130(2) & (3), when read together, make it clear that an answer may be adequate to avoid default even if it does not respond to all the allegations in the charging document, with the caveat that 'factual matters alleged in the charging document and not denied in the answer will be deemed admitted.'" ***---- In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI Orders 121, 124-25 (2014).***

❑ The agency filed a motion for default against respondent J. Bassett related to one set of formal charges on the grounds that his answer was untimely and was insufficient. The forum denied the agency's motion because the agency provided no evidence that J. Bassett was actually served with the formal charges. ***---- In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI Orders 121, 125-27 (2014).***

❑ The agency filed a motion for default against respondent J. Bassett related to a second set of formal charges on the grounds that his answer was untimely and insufficient. The forum denied the agency's motion because the agency provided no evidence of the date that J. Bassett was actually served with the formal charges and because his answer when read together with the formal charges, make it clear that an answer may be adequate to avoid default even if it does not respond to all the allegations in the charging document, with the caveat that 'factual matters alleged in the charging document and not denied in the answer will be deemed admitted.'" ***---- In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI Orders 121, 128 (2014).***

❑ When neither respondent nor any representative of his company appeared at the hearing, the forum delayed the commencement of the hearing for 30 minutes to account for any unexpected event that may have delayed the respondent's appearance, but no appearance was ever made by the respondent or any other person on his behalf, nor was any notice given to the forum explaining his failure to appear, respondent was found in default for failing to appear at the hearing. ***---- In the Matter of Diamond Concrete, Inc., 33 BOLI Orders 68, 69 (2014).***

❑ When neither respondent nor any representative of his company appeared at the hearing, the forum delayed the commencement of the hearing for 30 minutes to account for any unexpected event that may have delayed the respondent's appearance, but no

appearance was ever made by the respondent or any other person on his behalf, nor was any notice given to the forum explaining his failure to appear, respondent was found in default for failing to appear at the hearing. ***----- In the Matter of Bruce Crisman, dba Nu West Painting Contractors*, 32 BOLI 209, 210 (2013).**

❑ When Respondents were properly served and defaulted in a civil rights case by not filing an answer, the forum granted the agency's motion for an order holding respondents in default. ***----- In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 147 (2012).***

❑ When Respondents defaulted by not filing an answer, the forum's task was to determine if the agency presented a prima facie case on the record to support the agency's allegations. ***----- In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 161 (2012).***

❑ In a wage claim default case, the agency needs only to establish a prima facie case supporting the allegations of its OOD in order to prevail. ***----- In the Matter of E. H. Glaab, General Contractor, Inc., 32 BOLI 57, 61 (2012).***

❑ When respondent filed an answer and request for hearing, but did not make an appearance at the hearing, respondent was held in default and the hearing commenced. ***----- In the Matter of E. H. Glaab, General Contractor, Inc., 32 BOLI 60, 57 (2012).***

24.2 --- Amendments

24.3 --- Answer as Evidence (*see also* 10.2, 20.24)

❑ In a default case, the forum may consider any unsworn and unsubstantiated assertions contained in respondent's answer, but those assertions are overcome whenever they are contradicted by other credible evidence in the record. ***----- In the Matter of E. H. Glaab, General Contractor, Inc., 32 BOLI 57, 61 (2012).***

24.4 --- Forum's Responsibility

24.5 --- Limits on Damages/Relief

24.6 --- Representation by Counsel (*see also* 3.0, 10.0)

24.7 --- Relief from Default

25.0 RECORD OF HEARING

25.1 --- Reopening the Record (*see also* 27.0)

❑ After the hearing, the ALJ re-opened the record on his own motion to obtain a copy of claimant's original 2009-2010 nail salon appointment books for inspection. After inspecting the books, the ALJ copied two pages that appeared to contain inconsistencies with the Claimant's 2009-2010 calendars received at hearing and marked and received them into the record. Copies were provided to both participants and the original books mailed back to the claimant, with instructions to claimant to retain them until such time as the case was completely resolved and all appeal rights had expired. ***----- In the Matter of Susan C. Steves, 32 BOLI 43, 48-49 (2012).***

❑ After the hearing, the ALJ issued an interim order reopening the record and requiring respondents to provide copies of time records for respondent's employees that were not offered at hearing. Respondents filed a motion for clarification of the reason for the ALJ's interim order, arguing that it was improper under OAR 839-050-0410 for the ALJ to reopen the record to obtain this evidence if the purpose was to allow additional evidence relating to complainant's lost income because it was the agency's burden to establish complainant's damages at hearing, the agency could have requested these time records from respondent and offered them at hearing, and the agency did not do so. In response, the ALJ issued an interim order retracting the order. ***----- In the Matter of Cyber Center, Inc., 32 BOLI 11, 14 (2012).***

❑ In a child labor case which the ALJ proposed a civil penalty of $1,000 based on respondent's failure to obtain an employment certificate for a minor who sustained a "serious" injury while in respondent's employ, respondent excepted to the amount of the civil penalty, arguing that it was excessive and should be reduced to $100 because the minor's injury was "non-serious" and was respondent's first offense. Respondent attached an exhibit to its exceptions that was not offered at the hearing and requested that it be considered as evidence. The exhibit was the USDOL's "Notice to Employer-Employment of Minors Contrary to the Fair Labor Standards Act" that advised respondent that USDOL's had determined that the minor had been employed by respondent to operate a band saw and had sustained a "nonserious" injury "in illegal employment." Respondent gave no reason for not offering this exhibit at hearing and the forum declined to reopen the record to consider it. The forum further stated that, even if the record was reopened to consider the exhibit, the USDOL's conclusion that the minor sustained a "nonserious" injury would not be binding on the forum. For the reasons stated in the proposed order, the forum stands by its conclusion that Weller's injury was "serious" as defined by OAR 839-019-0025(4). ***----- In the Matter of Schultz Mfg., Inc., 32 BOLI 1, 10 (2012).***

25.2 --- Reconvenement

25.3 --- Settlement (*see also* 18.0)

25.4 --- Transcription

25.5 --- Leaving the Record Open

25.6 --- Other

26.0 LEGAL MEMORANDA, BRIEFS, STATEMENTS OF AGENCY POLICY

26.1 --- Briefs and Memoranda

❑ At the conclusion of the hearing, the Agency's request to submit briefs addressing the constitutional free speech defense was granted. Respondents' objection to the Agency's response, contending it contained legal argument not raised in the Agency's original brief and a sur-response, was over-ruled. ***---- In the Matter of Blachana, LLC, 32 BOLI 220, 226 (2013).***

Appeal pending.

❑ At hearing, prior to opening statements, the agency requested permission to file a post-hearing brief to address the legal arguments respondents raised in their case summary. The ALJ deferred ruling on the agency's motion until the conclusion of the evidentiary portion of the hearing. At the conclusion of the evidentiary portion of the hearing, the ALJ granted the agency's motion and respondents' request to file a reply brief. The ALJ also granted the agency's and respondents' requests that closing arguments be made after the briefs were filed. ***----- In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 101 (2012).***

26.2 --- Statements of Agency Policy

26.3 --- Written Closing Arguments

27.0 FULL AND FAIR INQUIRY (*see also* 25.1)

28.0 PROPOSED ORDERS

28.1 --- Generally

28.2 --- Exceptions

❑ The ALJ refused to consider the merits of respondents' written argument that the agency's exceptions should be rejected, on the basis that the forum did not request such a response and there is no procedure in the administrative rules for filing responses to exceptions. ***----- In the Matter of Blachana, LLC, 32 BOLI 220, 226 (2013).***

Appeal pending.

❑ Respondent filed exceptions focusing on two issues – the ALJ's credibility findings, and the amount of damages in the proposed award to complainant. Respondent's exceptions were denied because the ALJ's credibility findings and the proposed award of $10,000 in damages for emotional suffering were supported by substantial evidence in the record. ***----- In the Matter of Kenneth Wallstrom, 32 BOLI 63, 92-93 (2012).***

❑ In a child labor case which the ALJ proposed a civil penalty of $1,000 based on respondent's failure to obtain an employment certificate for a minor who sustained a "serious" injury while in respondent's employ, respondent excepted to the amount of the civil penalty, arguing that it was excessive and should be reduced to $100 because the minor's injury was "non-serious" and was respondent's first offense. Respondent attached an exhibit to its exceptions that was not offered at the hearing and requested that it be considered as evidence. The exhibit was the USDOL's "Notice to Employer-Employment of Minors Contrary to the Fair Labor Standards Act" that advised respondent that USDOL's had determined that the minor had been employed by respondent to operate a band saw and had sustained a "nonserious" injury "in illegal employment." Respondent gave no reason for not offering this exhibit at hearing and the forum declined to reopen the record to consider it. The forum further stated that, even if the record was reopened to consider the exhibit, the USDOL's conclusion that the minor sustained a "nonserious" injury would not be binding on the forum. For the reasons stated in the proposed order, the forum stands by its conclusion that Weller's injury was "serious" as defined by OAR 839-019-0025(4). ***----- In the Matter of Schultz Mfg., Inc., 32 BOLI 1, 10 (2012).***

❑ In a child labor case which the ALJ proposed a civil penalty of $1,000 based on respondent's failure to obtain an employment certificate for a minor who sustained a "serious" injury while in respondent's employ, respondent excepted to the amount of the civil penalty, arguing that it was excessive and should be reduced to $100 because the USDOL had already assessed a penalty based on similar facts. The forum rejected respondent's exception because the penalty assessed by the forum was based on respondent's failure to obtain an employment certificate, not the minor's injury. The forum noted that the injury was relevant to the amount of penalty assessed but was not the reason a penalty was assessed. In contrast, according to respondent's statement, the USDOL's penalty was assessed based on the fact that the minor suffered an injury. ***----- In the Matter of Schultz Mfg., Inc., 32 BOLI 1, 10 (2012).***

29.0 FINAL ORDERS

❑ BOLI final orders may be relied upon by the commissioner as precedent until reversed or modified by an appellate court decision; or the commissioner or an appellate court overrules a point of law contained in a final order. ***----- In the Matter of Blachana, LLC, 32 BOLI 220, 254 (2013).***

Appeal pending

30.0 CONSTITUTIONALITY

❑ In a case involving discrimination in public accommodation on the basis of sexual orientation, the forum need not consider a defense of unconstitutionality where respondents did not raise that defense in their answer. ***----- In the Matter of Blachana, LLC, 32 BOLI 220, 249 (2013).***

Appeal pending.

31.0 CONDUCT OF HEARING

31.1 --- Generally

31.2 --- Security

32.0 DECLARATORY JUDGMENT