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**Civil Rights Division - Bureau of Labor and Industries**  
**AMENDED NOTICE OF SUBSTANTIAL EVIDENCE DETERMINATION**

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Complainant: Jose R Tandy Vargas

Respondent: Sang In Nam DbA Cornerstone Janitorial Services

Case Number: STEMWB150323-12160

Investigator: Katherine Kestell

Filing Date: March 23, 2015

Reviewed By:

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**I. Jurisdiction**

Oregon Revised Statutes chapters 659A, ORS 25.337, 25.424, 171.120, 345.240, 441.178, 476.576, 651.060, 651.120, 652.355, 653.060 and 654.062, and Oregon Administrative Rules chapter 839 divisions 2, 3, 5, 6, 9 and 10 authorize the Civil Rights Division to accept, investigate, amend, resolve and determine complaints alleging unlawful practices in employment, housing, places of public accommodation, state government and career, professional and trade schools.

Specific facts supporting a conclusion that the Division has jurisdiction over respondent(s) are found below.

**II. Allegations**

On March 23, 2015, Complainant filed a complaint with the Civil Rights Division. Complainant alleges the following violation(s):

1. ORS 659A.199, in that Respondent terminated Complainant's employment on the basis of Complainant's protected whistleblowing activity.
2. ORS 659A.230 in that Respondent terminated Complainant's employment as a result of Complainant's perceived initiation of and participation in a civil investigation.
3. ORS 653.060 in that Respondent terminated Complainant's employment as a result of Complainant causing to be instituted a minimum wage rate investigation.
4. ORS 652.355 in that Respondent terminated Complainant's employment as a result of Complainant causing to be instituted a wage claim investigation.
5. ORS 659A.040 in that Respondent terminated Complainant's employment in retaliation for Complainant's invocation of the Oregon Worker's Compensation System.

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**III. Identity of Respondent(s)**

1. Respondent Sang In Nam dba Cornerstone Janitorial Services is an Oregon Corporation and is a person pursuant to ORS 659A.001(9).

**IV. Findings of Fact**

1. Respondent Sang In Nam DbA Cornerstone Janitorial Services employs one or more persons in the state of Oregon and is an employer pursuant to ORS 659A.001(4)(a).
2. At all times material to this complaint, Respondent employed six or more people and is a covered employer under ORS 659A.040.
3. Complainant was employed by Respondent as a general laborer intermittently beginning in 2008.
4. In August 2014, Complainant sustained an on-the-job injury while working on a contract Respondent had with Hoffman Construction to perform labor at Portland Community College (“the PCC job”). Respondent was not present at the time of the accident, so Hoffman Construction employees immediately called 911 and contacted Respondent.
5. Complainant filed a Workers’ Compensation claim which was accepted on or around August 27, 2014.
6. Around the time of Complainant’s injury, Hoffman Construction discovered that Respondent was not paying employees (including Complainant) the contractually obligated prevailing wage rate for the PCC job, and Hoffman initiated an internal investigation.
7. Hoffman Construction offered Complainant light duty work in their office for the remainder of the contract, which Complainant accepted and performed.
8. On September 28, 2014, Hoffman Construction initiated a prevailing wage rate investigation of Respondent conducted by the Wage and Hour Division of BOLI (“prevailing wage investigation”).
9. On or around October 17, 2014, Complainant alleges he presented Respondent with full duty release documents from his physician.
10. On or around October 20, 2014, Complainant alleges Respondent terminated his employment.

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11. Complainant alleges that after Respondent terminated his employment, Respondent continued to contact him both in person at his home and by telephone in order to offer Complainant cash in exchange for dropping the prevailing wage complaint.
12. Complainant filed a verified civil rights complaint with BOLI on March 23, 2015.
13. In response to this Complaint, Respondent submitted a document dated April 24, 2015 entitled "Declaration of Sang In Nam" in which Respondent states:
  - a. Complainant worked for Respondent intermittently from 2008 to 2014.
  - b. Complainant was an at-will employee.
  - c. In October 2014, Respondent became aware Complainant was released to full duty. Respondent called Complainant to ask if he could work at a cleaning job in Hillsboro and was told by Complainant he could not work at the job because he was already working a concrete job in Camas, Washington. This offer occurred after the prevailing wage investigation was initiated.
  - d. Respondent became dissatisfied with Complainant's work because he showed up intoxicated to a job site and often disappeared from the job site.
  - e. Respondent was also dissatisfied with Complainant's work because Complainant told Respondent on one occasion that he worked certain days on a job for Hoffman Construction, but Respondent was informed by Hoffman Construction that Complainant was not present on those days.
  - f. "I have not contacted Mr. Vargas after offering him the Embassy Suites job in October 2014."
14. In connection with this investigation, BOLI obtained a copy of a receipt signed by Complainant and Respondent Sang In Nam (investigator's note: Respondent's signature matches the signature located on "Declaration of Sang In Nam") on December 1, 2014. This receipt states that on that date Respondent paid Complainant the sum of \$5,000 and promised to pay Complainant an additional \$5,000 prior to December 31, 2014 "to clear off remaining balance of prevailing wage issue."
15. BOLI interviewed Jacob McKay who was the superintendent at PCC for Hoffman Construction. McKay stated:
  - a. The day of Complainant's accident is when he first came into contact with Complainant and other employees of Respondent.
  - b. After the accident, his goal was to put Complainant back to work and ensure Complainant was paid for that work.
  - c. He sometimes called Respondent to ensure Complainant was paid.
  - d. Respondent's contract with Hoffman was terminated shortly after Complainant's injury but he does not recall how long after.

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- e. During Complainant's time working light duty for Hoffman, there were times they ran out of office work and Complainant was allowed to go home but Hoffman told him they would pay him for a full 8 hours of work. During Complainant's light duty time Complainant was permitted to go to the doctor during work hours and Hoffman agreed to pay him for that time.
  - f. His only possible explanation for Respondent's contention that Hoffman had reported Complainant didn't work hours he was paid for is that there was a very good reason for it: that Hoffman agreed to pay Complainant for the hours.
16. BOLI interviewed Rebecca Hodges, who was Hoffman Construction's office manager at the PCC site. Hodges recalled:
- a. Once Complainant was injured, when he filled out the Worker's Compensation paperwork it was brought to her attention through McKay that Respondent's employees were not being paid prevailing wage.
  - b. Hoffman had Complainant bring in copies of the checks he received from Respondent and she was present for Complainant's initial BOLI interview, with an interpreter.
  - c. Respondent seemed more agitated around the time of the wage complaint.
  - d. She never witnessed Complainant appearing intoxicated.
  - e. She is not aware of Complainant billing for any hours he didn't work.
  - f. She observed Respondent's lead worker, Isaac Arreola, to be very upset with Complainant around this time. In an interview conducted in conjunction with Hoffman's investigation of Respondent, Arreola stated that this is all because Jose got hurt and he told how much they were getting paid.
17. BOLI interviewed Burton Strode who worked for Respondent occasionally. Strode recalled:
- a. Arreola was upset around the time of the investigations because he wanted all Respondent's employees to say Respondent was paying them the money he was supposed to.
  - b. Complainant was a good worker who worked for Respondent a long time.
  - c. Complainant was let go because when he filled out the worker's compensation documentation Complainant put his hourly wage on the form and McKay saw it.
  - d. Complainant showed up for work every day and wasn't drunk or anything so he was the type of worker Respondent would have been looking for.
  - e. He continued to work for Respondent, for example on a project in Junction City, after the conclusion of the PCC contract.
18. In interview with BOLI, Complainant stated:

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- a. He never had any knowledge of a cleaning job in Hillsboro Oregon.
  - b. He would not have rejected Respondent's offer of full duty work in October 2014 in lieu of a concrete job in Camas because he did not work a concrete job in Camas at that time.
  - c. Sometime in October 2014, Complainant met with Respondent at Pioneer Square to receive his last paycheck from the PCC job and give him a copy of his doctor's full duty release. At that time Respondent told Complainant there would be no further work for him.
  - d. Respondent did not offer Complainant more work, but did continue to contact Complainant two or three times per week and come to Complainant's home to offer him cash in exchange for Complainant dropping the BOLI complaint.
  - e. Complainant received a total of \$10,000 in cash from Respondent which Complainant wrote a receipt for, which was signed by Complainant and Respondent.
19. BOLI attempted to make arrangements to interview Respondent Sang in Nam between July 15, 2015, and December 4, 2015. Through email with Respondent's attorney Katelyn Skinner, Respondent stated a need for a Korean interpreter. Respondent did not agree to either of the two options provided by BOLI: a telephone interview with an interpreter on the line or an in-person interview at the BOLI Portland office with an interpreter on speaker phone. Respondent did not state a reason but expressed a willingness only to participate in an in-person interview at his attorney's office in Sherwood, Oregon, with an interpreter provided by BOLI.

#### **V. Summary**

Under the different or unequal treatment theory, when a Respondent treats members of a protected class differently than others who are not members of that protected class because of the individual's protected class and not because of legitimate non-discriminatory reasons, unlawful discrimination exists. OAR 839-005-0010 (d)(B). In this case, Complainant was a member of two protected classes: Complainant was injured at work and filed an Oregon Workers' Compensation Claim and was directly associated with a prevailing wage investigation of Respondent.

The evidence in this case supports a conclusion that Respondent's legitimate nondiscriminatory reasons for not continuing an employment relationship with Complainant are pretext. There is no evidence supporting Respondent's suggestion that Complainant engaged in wage theft while working at the PCC job. Instead, credible testimony by McKay, the foreman at that job serves to illustrate that Complainant was intentionally paid for hours he was not present at the site, either due to a shortage of light duty work or due to Complainant's doctor's appointments. As to Respondent's

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allegations that Complainant appeared intoxicated at work, this allegation is not supported by witnesses Rebecca Hodges or Burton Strobe.

The other possible reason provided by Respondent for the termination of his six-year employment relationship with Complainant was that he offered Complainant full duty work in October 2014, which Complainant rejected. Complainant denies this. Respondent did not provide evidence supporting this statement.

In his signed declaration, Respondent stated that he did not contact Complainant after offering him full duty work in October 2014. This statement is not truthful in light of the parties signing a document on December 1, 2014 which confirms that Respondent paid Complainant \$10,000 that month in two installments.

Complainant has provided substantial evidence that Respondent terminated his employment.

Witness Burton Strobe, who was neither injured at work nor perceived to have been involved in the initiation of the prevailing wage investigation continued to receive opportunities to work for Respondent after Complainant was terminated.

Complainant has provided substantial evidence that Respondent terminated his employment when another comparably situated individual who was not a member of Complainant's protected classes was allowed to continue working for Respondent. Considering the totality of the facts and circumstances in this case, it is reasonable to conclude that Complainant's protected class membership was a motivating factor in his termination.

**VI. Determination(s)**

The Bureau of Labor and Industries, Civil Rights Division, finds **SUBSTANTIAL EVIDENCE OF AN UNLAWFUL EMPLOYMENT PRACTICE (termination)** based on Complainant causing to be instituted a wage claim investigation, in violation of ORS 652.355(1)(b).

The Bureau of Labor and Industries, Civil Rights Division, finds **SUBSTANTIAL EVIDENCE OF AN UNLAWFUL EMPLOYMENT PRACTICE (termination)** based on Complainant's perceived initiation of a civil investigation, in violation of ORS 659A.230.

The Bureau of Labor and Industries, Civil Rights Division, finds **SUBSTANTIAL EVIDENCE OF AN UNLAWFUL EMPLOYMENT PRACTICE (termination)** based on Complainant's use of the Oregon Workers' Compensation system, in violation of ORS 659A.040.

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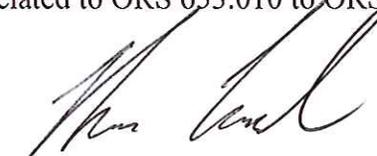
The Bureau of Labor and Industries, Civil Rights Division, finds NO SUBSTANTIAL EVIDENCE of an unlawful employment practice (termination), based on protected whistleblowing activity in violation of ORS 659A.199.

The Bureau of Labor and Industries, Civil Rights Division, finds NO SUBSTANTIAL EVIDENCE of an unlawful employment practice (termination), based on Complainant's causing to be initiated proceedings under or related to ORS 653.010 to ORS 653.261.



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Katherine Kestell  
Senior Investigator  
Civil Rights Division



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Chris Lynch  
Portland Operations Manager  
Civil Rights Division