IN THE SUPREME COURT OF THE STATE OF OREGON

GENE SUMMERFIELD,

Plaintiff-Appellant,
Petitioner on Review,

v.

OREGON LIQUOR CONTROL COMMISSION,

Defendant-Respondent,
Respondent on Review.

Clackamas County Circuit Court
CV12100185

Court of Appeals
A157108

S066377

PETITIONER'S REPLY BRIEF

Petition for Review of the decision of the Court of Appeals of a Judgment of the Circuit Court for Clackamas County
Honorable Katherine Weber, Circuit Judge

Decision filed: 17 October, 2018
Affirmed by opinion
Before: DeVore, PJ, Garrett, J, and James, J. (*vice* Duncan, *pro tempore*)

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PETITIONER'S REPLY BRIEF

In brief reply to respondent's Answering Brief, appellant submits the following, addressed to the First and Third questions propounded by the Court. Petitioner relies on his previous briefing with regard to the Second question

II. ARGUMENT

A. Equitable relief

"Plaintiffs either establish discrimination or they do not. Here, they did. Once discrimination is established, plaintiffs are entitled to relief under [former] ORS 659.121." *Ballinger v. Klamath Pac. Corp*., 135 Or. App. 438, 448, 898 P.2d 232 (1995). Since, by its verdict on the whistleblower claim under ORS 659A.199, the jury, following the court's instructions, found that plaintiff had been retaliated against and had suffered damage, but that he should not get any monetary relief, the jury's verdict necessarily requires the conclusion that plaintiff was entitled to some other kind of relief, *viz*., an equitable remedy. ORS 659A.885(1).

Defendant's response to the question of plaintiff's entitlement to equitable relief focuses more on the propriety of the relief sought than it does on the actual question posed by the Court, namely, whether a plaintiff who is found by a jury to have been the victim of retaliation and to have been damaged thereby, but awarded no monetary damages, is entitled to *some* form of

equitable relief.

1. What the jury determined

Defendant's argument is based on the dubious proposition that it is absolutely certain that the jury found that plaintiff was not wrongfully terminated. This is far from obvious, nor is the answer to it dispositive of the question.

The jury decided that the defendant "discharged, demoted, suspended or discriminated or retaliated against the plaintiff with regard to any term, condition or privilege of employment" because the plaintiff in good faith reported information that he believed was a violation of a law, rule or regulation, and that he was damaged thereby. The jury made no findings as to which terms, conditions or privileges of employment were involved, nor did the jury explain why plaintiff should not get any monetary relief for the damage it found.[1]

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[1] The verdict form did not ask the extent to which plaintiff was actually damaged. Instead, it was phrased, oddly, in terms of whether plaintiff *should* be awarded monetary damages. The jury answered that plaintiff *should* be awarded no monetary damages. ER - 72. Rather than a reflection of the amount of damage actually suffered, this may be more of a reflection of defendant's (successful) *ad hominem* approach to the trial, which may have convinced the jury that plaintiff should not get any monetary compensation regardless of his actual damages. The Court did not request briefing on that issue, which was addressed in plaintiff's brief before the court of appeals (*see* Appellant's

In his complaint, plaintiff alleged numerous adverse employment actions as having been retaliatory for his whistleblowing activity. *See* ER 1-10, especially ¶¶7, 8, 9, 14, 16, 17, 18, 19 (¶19 alleges the termination). As a basis of his Third Claim for Relief (the whistleblower retaliation claim under, *inter alia*, ORS 659A.199), plaintiff realleged ¶¶1 through 22 of the Second Amended Complaint. ER - 6 at ¶28. Plaintiff's counsel referred to the termination in opening (Tr. 677, 680, 681), and in closing referred to "a lot of adverse employments actions," as well as to plaintiff's termination (Tr. 3173, 3191); defendant's counsel defended the termination in opening (Tr. 694, 696), and again in closing (*see*, *e.g.*, Tr. 3210); the trial court apparently found enough evidence in the record to instruct the jury that retaliatory "discharge" was one of the adverse employment actions prohibited by ORS 659A.199. Tr. 3143. That instruction was developed, in part, at the suggestion of defendant (Tr. 3002), who did not take exception to the instruction as given. Tr. 3226. Defendant's suggestion that the termination was not even before the jury is inconsistent with the record.

Since the discharge plainly was part of the record considered by the jury, it simply cannot be said, with even minimal certainty, that plaintiff's

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Opening Brief at 44 and Assignments of Error 6 through 13).

termination was *not* one of the adverse employment actions found to have been visited upon him in retaliation for his whistleblower activity, in violation of ORS 659A.199.[2]

2. Relief requested

In his Second Amended Complaint, plaintiff prayed for monetary relief. ER 7-8, ¶¶1, 2, 4-6. His prayer also included the following requests for equitable relief:

> 3. Reinstatement;
> * * *
> 7. Plaintiff seeks injunctive relief ordering Defendant to cease and desist its illegal practices under each above cited statute and to take appropriate steps to assure such conduct does not occur again.
> 8. Order Defendant to carry out and institute policies, practices and programs that affirmatively eradicate the effects of past and present violations;
> 9. Any and all other relief as this court may deem proper.

Id.

After trial, addressing his request for equitable relief to the court, plaintiff requested that the court award him front pay, in lieu of reinstatement,

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[2] The fact that the jury awarded no monetary damages is neither here nor there. The jury could have found the wrongful termination but simply did not accept the amount of damage claimed. The jury did necessarily find that petitioner had been damaged by the retaliation. In any event, "to speculate concerning the mental processes of juries is forbidden the courts under Oregon Constitution, Art VII, § 3." *Mullins v. Rowe*, 222 Or. 519, 522, 353 P.2d 861 (1960).

and injunctive relief. ER 73-77. In Plaintiff's Reply to Defendant's Combined Response to Plaintiff's Motion for Equitable and Compensable Relief and Proposed General Judgment ("Reply"), at 5, plaintiff requested additional, more specific injunctive relief:

> (1) An order from the court specifying that no negative job references are to be given when prospective employers call. A fairly standard response could be crafted such as "we will only confirm dates of employment and rates of pay in a request for job references."
>
> (2) An order from the court not to interfere with plaintiff's potential future employment with the State.
>
> (3) An order from the court requiring mandatory training for OLCC employees about whistleblower retaliation.

Again, this was in addition to plaintiff's further request in his Second Amended Complaint for "[a]ny and all other relief as this court may deem proper." ER 8 at ¶9.

3. Limitations on the award of equitable relief.

Defendant's argument is that the relief requested was "not appropriate" because "all of it related to his wrongful termination." Respondent's Brief §A.3, at 21, et seq. As discussed above, whether the relief requested related to his wrongful termination is beside the point, since it is unclear which adverse employment action(s) the jury found to have been retaliatory. If the jury did find that the termination was one of the adverse employment actions, which is a

distinct possibility, defendant's argument becomes entirely unsupportable, and reinstatement or front pay in lieu thereof is a perfectly appropriate equitable remedy, as were the other equitable remedies requested or otherwise available.

If, on the other hand, the jury did not find plaintiff's termination to have been wrongful, they still found plaintiff to have been the victim of and damaged by retaliation for his whistleblowing activity. While that may not have entitled him to reinstatement or front pay, that does not exhaust the universe of available modes of equitable relief. As noted above, plaintiff requested several different equitable remedies, some of them directed at his own circumstances (Reply, *id*. at ¶¶ (1), (2)), and some systemic (ER - 8, ¶¶7, 8), none of which is dependent on a jury finding of wrongful discharge.

In light of his entitlement to some form of equitable relief, the particular equitable relief specifically requested is of less importance.

> "[T]he fact that plaintiffs have requested relief to which they are not entitled does not defeat their claim. A prayer for relief is not a part of the complaint. *Finch v. Miller, Credithrift*, 271 Or. 271, 275, 531 P.2d 892 (1975). Moreover, 'a prayer for the wrong relief following a pleading that sets forth facts entitling the pleader to *some* relief does not operate to deny the proper relief[.]' *Wright v. Morton*, 125 Or. 563, 569, 267 P. 818 (1928). Although plaintiffs sought [unavailable relief], they also sought 'other and further relief as the Court deems just and equitable.' We, therefore, address plaintiffs' as-applied constitutional claims, because other relief, such as more limited injunctive relief, might be appropriate

should plaintiffs prevail."

Doe 1 v. State, 164 Or. App. 543, 548-549, 993 P.2d 822 (1999) (emphasis added); *see Ornduff v. Hobbs*, 273 Or. App. 169, 174, 359 P.3d 331 (2015); *Ballinger*, 135 Or. App. at 450 n 10 ("Equitable relief need not take the precise form, amount or duration that a plaintiff might choose to seek; the trial court has discretion to fashion a remedy that is appropriate under the unique circumstances of each case.").

The final question is what an "appropriate" remedy might be.[3] "An equity court has broad power to fashion an appropriate remedy. However, the court's discretion is not absolute, and it must be exercised within bounds of sound legal and equitable principles." *Mainland Indus. v. Timberland Machs. & Eng'g Corp*., 58 Or. App. 585, 593, 649 P.2d 613 (1982). The court of appeals has had the occasion to consider what an "appropriate" equitable remedy might be on several occasions. In *Ellison v. Watson*, 53 Or. App. 923, 930, 633 P.2d 840, rev. den., 292 Or. 109 (1981), for example, the court found that granting the reformation of a contract was not an appropriate equitable remedy where "the relief granted is not only outside the scope of the pleadings, but involves a matter specifically excluded from the case by the plaintiff with

[3] This becomes primarily significant in the event the case is remanded.

the knowledge and consent of the defendants and the court." Similarly, in *Shumate v. Robinson*, 52 Or. App. 199, 627 P.2d 1295 (1981), the trial court's granting of an easement was held, on the record in that case, to be an inappropriate remedy: "The broad power of a court of equity should not be invoked to shape a decree which was not reasonably contemplated by the parties and which, as here, represents a substantial departure from the pleadings and the legal theories relied upon by the parties." *Id*. at 205. In *Port of Morrow v. Aylett*, 186 Or. App. 70, 77, 62 P.3d 427 (2003), a grant of injunctive relief was reversed as inappropriate because it "concerned subject matter that not only was not the grounds for the litigation but that was specifically disavowed by the party seeking relief as being properly before the court." In *Doe*, *supra*, the court of appeals reversed an injunction staying the effect of a ballot measure when plaintiffs had conceded the legislation was not facially void but contended only that the legislation would be unconstitutional as applied to them. *Id*. at 548.

There are some commonalities among these cases. Equitable relief is probably not appropriate if it is beyond the contemplation of the pleadings, or if the plaintiff specifically disavowed the basis for relief, or if, as in *Doe*, plaintiff isn't entitled to any relief on the merits of the underlying claim.

The factors rendering the equitable relief inappropriate in those cases are entirely absent from the present case. There is nothing extraordinary about the specific requests for equitable relief, they are plainly within the contemplation of the pleadings, they are in no way surprising, they have never been disavowed by plaintiff and they all relate to rectifying, or at least ameliorating, the negative effects of the retaliation. Equitable relief in this case, in general or in the specifics of the relief requested, is "within bounds of sound legal and equitable principles." *Mainland Indus*., 58 Or. App. at 593. There is nothing about the requested relief – or relief in general – that is inappropriate nor is there any suggestion that the court on its own might not find a more "appropriate" remedy.[4]

B. JURY INSTRUCTION

1. The jury instruction

On plaintiff's whistleblower retaliation claim under ORS

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[4] To paraphrase the court in *Ballinger*, 135 Or. App. at 450 n. 10, now, in 2019, some seven years after the fact and five years after the trial, relief that might have been "equitable" then may no longer be appropriate. Therefore the nature and appropriateness of any particular remedy must be considered in the light of present circumstances, and the court must have the flexibility to determine what equitable remedy might *now* be appropriate, notwithstanding the particular equitable relief previously requested.

659A.030(1)(f), both parties requested instructions on adverse employment action. Defendant's requested instruction was the kind of "terms and conditions of employment" instruction that may have been appropriate for a discrimination claim under ORS 659A.030(1)(a)-(e), which would ultimately depend on their effecting "a significant change in employment status." Tr. 3014. *See Meyer v. State*, 292 Or. App. 647, 679 n. 10, 426 P.3d 89 (2018).

Such instruction, however, was unquestionably inappropriate for a retaliation claim under ORS 659A.030(1)(f), in which the Oregon courts have been consistent in applying the broader "dissuade from protected activity" type of instruction that had been identified as applicable to retaliation claims under Title VII by the U.S. Supreme Court, in *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 63-4, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). *See Meyer*, 292 Or. App. at 679 n. 10. That kind of instruction is not limited to matters affecting the terms and conditions of employment.

Plaintiff submitted two alternative requested instructions, respectively tracking the language applying that standard by the Supreme Court, in *Burlington Northern*, *id*., and by the Ninth Circuit, in its *Model Civil Jury Instructions* (MCJI) 10.4A.1. The instruction drawn from *Burlington Northern* was:

> A wide array of disadvantageous changes in the workplace could constitute adverse employment actions.
>
> An employment action is adverse if a reasonable employee would have found the challenged action materially adverse, meaning it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination or complaining about his wages.

ER - 69.

This tracks the language of *Burlington Northern*, *id*. at 68 (emphasis added):

> "a plaintiff must show that *a reasonable employee would have found the challenged action materially adverse,* 'which in this context means *it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination*.'"

Plaintiff submitted, alternatively, Ninth Circuit MCJI 10.4A.1, which is strikingly similar but more tersely reads:

> "An action is an adverse employment action if *a reasonable employee would have found the action materially adverse*, which means it *might have dissuaded a reasonable worker from making or supporting a charge of discrimination.*"

Tr. at 3049-51 (emphasis added).

As this Court explained in *Portland State University Chapter of the American Association of University Professors v. Portland State Univ*., 352 Or. 697, 711, 291 P.3d 658 (2012) (*"PSU"*), in addressing claims asserting a violation of ORS 659A.030(1)(f), the administrative agencies and the courts

have looked to the analytical framework developed for deciding retaliation claims brought under Title VII (42 USC § 2000e-3(a)). There are a number of reasons for that, including: the two statutory schemes are "substantially similar," they express substantially similar legislative purposes and, pragmatically speaking, "the federal courts, unlike this court, have had frequent occasion to construe and directly apply those provisions." *Id*.

In *PSU*, the Court placed primary reliance on the decision in *Burlington Northern* and concluded that ORS 659A.030(1)(f) and 42 USC § 2000e-3(a) should be similarly understood:

> "ORS 659A.030(1)(f), like 42 USC section 2000e-3(a), prohibits an employer from subjecting any person engaged in a protected activity to disparate treatment *when such treatment would impede access to the remedial mechanisms contained under those respective measures*. An employment policy that expressly targets employees who have filed complaints with regulatory agencies, and then denies those employees an important right guaranteed to other employees, frustrates the remedial purpose of ORS chapter 659A and Title VII. *In other words, the employer's policy would tend to dissuade employees from pursuing their protected rights* because exercising those rights would result in a substantive difference in treatment."

PSU, 352 Or. at 717 (emphasis added). .

This Court has not revisited the question. The Court of Appeals, in *Meyer*, 292 Or. App. at 678, has. To reiterate what has previously been

addressed in plaintiff's Brief on the Merits, the court there held:

> "The elements of a prima facie case under ORS 659A.030(1)(f) are substantially similar [to those under Title VII, 42 USC §2000e-3a. *See Medina v. State of Oregon*, 278 Or. App. 579, 588, 377 P.3d 626 (2016) (noting that, to establish an ORS 659A.030(1)(f) claim, plaintiffs must show that (1) they engaged in the protected activity of complaining of discrimination, (2) they were subject to discriminatory action, and (3) the discriminatory action was taken against them because of their protected complaint); *Portland State Univ. v. Portland State Univ.*, 352 Or. 697, 711-13, 291 P.3d 658 (2012) (noting that we 'commonly * * * look[ ] to the framework used in analyzing claims brought under Title VII's antiretaliation provision specifically because the federal provision is substantially similar to' ORS 659A.030(1)(f) and, accordingly, adopting the federal 'materially adverse' standard to define discriminatory actions under ORS 659A.030(1)(f) (internal citations omitted))."

More to the point, the Court of Appeals held:

> "Whether an employment action is materially adverse under both ORS 659A.030(1)(f) and section 2000e-3(a) – the statutes creating state and federal retaliation claims – is defined by the standard articulated in the Supreme Court's decision in *Burlington N. & S. F. R. Co. v. White*, 548 U.S. 53, 57, 126 S Ct 2405, 165 L Ed 2d 345 (2006) (*Burlington*). *See PSU Association of University Professors*, 352 Or. at 712-13 (adopting the *Burlington* 'materially adverse' standard to claims made under ORS 659A.030(1)(f)). In *Burlington*, the Court concluded that, in retaliation cases, 'those (and only those) * * * actions that would have been materially adverse to a reasonable employee or job applicant' can constitute adverse actions. 548 U.S. at 57 (emphasis added). According to the Court, for an employer's action to be materially adverse, that action '*must be harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination*.' *Id*. Under that standard, an employment action

> can be adverse even where it does not affect 'the employee's compensation, terms, conditions, or privileges of employment.' *Id*. at 61 (internal quotation marks omitted)"

Meyer, id. at 679 (emphasis added). Ultimately, in *Meyer*, the court applied those standards and concluded that the employer's actions were materially adverse because they "could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Id.* at 680-1.[5]

Plaintiff's alternative requested jury instructions were couched in just those terms, which were, as discussed, consistent with the language of *Burlington Northern*, *PSU* and *Meyer*. The requested instructions were accurate statements of the law and should have been given.

2. The error was not harmless

In the posture of this case, the court was required to give a requested instruction defining "adverse employment action." The fundamental reason is that there are two different definitions for "adverse employment action,"

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[5] Various ways of expressing the "materially adverse" standard have been used: "well might have dissuaded" (*Burlington Northern*), "might have dissuaded" (Ninth Circuit, following *Burlington Northern*), "would tend to dissuade" (*PSU*, after *Burlington Northern*), "could well have dissuaded" (*Meyer*, after *Burlington Northern* and *PSU*). Given the linkage among them, the courts all seem to have been expressing the same standard. Indeed, it would be difficult to divine a solid, let alone consistent, linguistic distinction among the formulations, which appear to be essentially identical.

depending on the claim. The narrower "adverse employment action" in plaintiff's whistleblower claim under ORS 659A.199 is not the same as the broader "adverse employment action" underlying the retaliation claim under ORS 659A.030(1)(f).

The court instructed the jury on plaintiff's retaliation claim under ORS 659A.030(1)(f), which instruction included the following:

> "Two, *the employer subjected the plaintiff to an adverse employment action*. And, three, the plaintiff was subjected to the *adverse employment action* because of his opposition to or report of – or reports of racial discrimination and/or harassment in the workplace."

Tr. 3148 (emphasis added). No explanation of what "adverse employment action" meant was given in the context of this retaliation claim. From the foregoing discussion, it is clear that, for the purposes of a retaliation claim under ORS 659A.030(1)(f), "[a]n action is an adverse employment action if a reasonable employee would have found the action materially adverse, which means it *might have dissuaded a reasonable worker from making or supporting a charge of discrimination.*" *See, e.g., Meyer*, 292 Or. App. at 679 (emphasis added). That is different from the adverse employment action related to the whistleblower claim, which is limited to actions relating to the terms and conditions of employment. The question is how a jury might know which

"adverse employment action" was meant in *this* context.

They certainly couldn't have found that out from the instructions. The only other time the term "adverse employment action" had been used was in the verdict form, on the line corresponding to the whistleblower retaliation claim, the instruction which described the adverse employment action in that context without naming it as such. That description, applicable to whistleblower claims under .199, again as has been discussed, related only to terms and conditions of employment and is inaccurate as an instruction on the kind of adverse employment action that would support a .030(1)(f) retaliation claim. Without the instruction requested by plaintiff, the jury is at a loss to know what the court meant when it said "adverse employment action," to plaintiff's disadvantage.

There is no good reason for the trial court to have refrained from giving the jurors a workable definition of the ambiguous term "adverse employment action" as it related to the retaliation claim, especially since its meaning is different when applied to the whistleblower claim. The fact that the jury returned different verdicts on the two claims strongly suggests that the jury was as confused as the court. The error was not harmless.

This kind of instructional confusion could be avoided if the court were to

simply refrain from using the term "adverse employment action," and instead use the operative definitions. This may be difficult in practice, since "adverse employment action" is a very convenient shorthand term for the rather lengthier for "those actions of an employer that may give rise to liability if taken in retaliation for an employee's protected activity." Unfortunately, "adverse employment action" has multiple meanings. To avoid confusion, if the court is going to use "adverse employment action," the court must accurately define the term appropriately for the context in which it is used.

III. CONCLUSION

For the reasons set forth above, and those advanced in Appellant's briefing before the Court of Appeals and in Petitioner's Brief on the Merits herein, Petitioner respectfully requests that this court reverse the judgment of the trial court and remand the case for a new trial and/or for a determination of what equitable relief would be appropriate.

Dated 22 August, 2019.

s/ Michael E. Rose
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CERTIFICATE OF COMPLIANCE

I certify that (a) this Petitioner's Reply Brief complies with the word-count limitations of ORAP 9.17(2)(c), and that the word count of this petition (as described in ORAP 5.05(1)(b)) is 3902 words. I further certify that this brief is produced in 14 point Times New Roman font for both the text of the brief and the footnotes, as required by ORAP 5.05.

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CERTIFICATE OF FILING and SERVICE

I certify that on 22 August, 2019, I filed the original foregoing PETITIONER'S REPLY BRIEF with the Appellate Court Administrator to be filed with this Court and to be served upon the following counsel through the eFiling system.

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