FILED June 20, 2019 07:43 PM
Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

GENE SUMMERFIELD,

Plaintiff-Appellant,
Petitioner on Review,

vs.

OREGON LIQUOR CONTROL COMMISSION,

Defendant-Respondent,
Respondent on Review.

Clackamas County Circuit Court
CV12100185

A157108

S066377

PETITIONER'S BRIEF ON THE MERITS

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*)

MICHAEL E. ROSE OSB #753221
CREIGHTON & ROSE, PC
65 SW Yamhill Street, Suite 300
Portland, Oregon 97204
(503) 221-1792
Of Attorneys for Plaintiff-Appellant,
Petitioner on Review,
Gene Summerfield

ELLEN ROSENBLUM OSB #753239
Attorney General
COLM MOORE #051750
Senior Assistant Attorney General
DEPARTMENT OF JUSTICE
1162 Court Street NE
Salem, Oregon 97310
(503) 378-4402
Attorneys for Defendant-Respondent

June, 2019

TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF AUTHORITIES ii

I. LEGAL QUESTIONS PRESENTED; PROPOSED RULES OF LAW 1

II. NATURE OF PROCEEDINGS BELOW 2

II. STATEMENT OF HISTORICAL AND PROCEDURAL FACTS 3

III. SUMMARY OF ARGUMENT 3

IV. ARGUMENT 4
A. LEGISLATIVE INTENT 4
B. EQUITABLE REMEDIES 6
C. REEMPLOYMENT 18
D. JURY INSTRUCTION 22

VI. CONCLUSION 35

CERTIFICATE OF COMPLIANCE 36

APPENDIX:

A. Copy of Court of Appeals Opinion . . . . App. - 1
B. Excerpt of Appellant's Opening Brief: Facts . . . . App. - 7
C. ORS 659.121 . . . . App. - 14
D. ORS 659A.885(1)-(3) (2011) . . . . App. - 16
E. Trial court register; *Foster vs. Miramontes,*
Benton Co. No.0510408. . . . . App. - 18

CERTIFICATES OF FILING/SERVICE

TABLE OF AUTHORITIES

CASES

Bain v. Tri County Metro. Transp. Dist., 1993 U.S. Dist. LEXIS 13413 (D. Or. 1993) 18

Bain v. Tri County Metro. Transp. Dist, 1996 U.S. App. LEXIS 4831 (9th Cir. 1996) 19

Ballinger v. Klamath Pac. Corp., 135 Or. App. 438, 898 P.2d 232 (1995) . . 9-12, 16, 17

Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959) 13-15

Beall Transp. Equip. Co. v. S. Pac. Transp., 186 Or. App. 696, 64 P.3d 1193 (2003) 35

Bishop v. Baisley, 28 Or. 119, 41 P. 936 (1895) 12, 16

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed2d 633 (1998) 27, 31

Burlington Northern & Santa Fe Ry. v. White,, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006) 22, 27, 28, 30, 32, 34

Carney v. Guard Publishing Co., 48 Or App 147, 616 P.2d 548 (1980) 18

Coszalter v. City of Salem, 320 F.3d 968 (9th Cir. 2003) 29

Dairy Queen v. Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962). . . . 13, 14

Does 1 7 v. State of Oregon, 164 Or. App. 543, 993 P.2d 822 (1999) 17

Harris v. Pameco Corp., 170 Or. App. 164, 12 P.3d 524 (2000) 29

Hernandez v. Barbo Mach. Co., 327 Or. 99, 957 P.2d 147 (1997) 32, 35

Hess v. Multnomah County, 216 F. Supp.2d 1140 (D. Or. 2001) 29

Hoopes v. Dolan, 168 Cal. App. 4th 146, 85 Cal. Rptr. 3d 337 (2008) 16

Knapp v. City of North Bend, 304 Or. 34, 741 P.2d 505 (1987) 30

L. A. Police Protective League v. Gates, 995 F.2d 1469 (9th Cir. 1993) 15

M.K.F. v. Miramontes, 352 Or. 401, 287 P.3d 1045 (2012) 12, 14-16

Mains v. II Morrow, Inc., 128 Or. App. 625, 877 P.2d 88 (1994) 29

Meyer v. State, 292 Or. App. 647, 426 P.3d 89 (2018) 27, 28, 33, 34

Port of Morrow v. Aylett, 186 Or. App. 70, 62 P.3d 427 (2003) 17

PSU Association of University Professors v. Portland State Univ., 352 Or. 697, 291 P.3d 658 (2012) 28

Ray v. Henderson, 217 F.3d 1234 (9th Cir 2000) 32

Robinson v. School Dist., 92 Or. App. 627, 759 P.2d 1116 (1998). 18, 21

State v. Williamson, 214 Or. App. 281, 164 P.3d 315 (2007) 31

Troy v. Bay State Computer Group, Inc. 141 F.3d 378 (1st Cir. 1998) 15

Van Ripper v. Liquor Cont. Com., 228 Or. 581, 365 P.2d 109 (1961) 30

STATUTES AND RULES

42 USC §2000e-3(a) 28

OAR 839-06-0135 . . . . 18, 20

OAR 839-06-100 - 165 21
OAR 839-005-0125 30
ORAP 9.20 . . . . 3, 4
ORCP 67 C 17
ORS 659.030 . . . . 9, 10, 29, 34
ORS 659.121 . . . . 9, 10
ORS 659A.003 5
ORS 659A.006 6
ORS 659A.006 . . . . 5, 6
ORS 659A.030 . . . . 2, 4, 22
ORS 659A.030(1)(f) 2, 4, 22, 23, 28, 30, 31
ORS 659A.046 . . . . 1, 21
ORS 659A.046 . . . . 1, 2, 21, 22
ORS 659A.052 21
ORS 659A.052 . . . . 21, 22
ORS 659A.199 . . . . 1, 7-9, 11, 12, 23, 27, 34
ORS 659A.805 29
ORS 659A.885 . . . . 9, 10, 11
ORS ch. 659A 1, 3, 5-7

CONSTITUTIONAL PROVISIONS

Article I, section 17, Oregon Constitution 11

Article VII (Amended), section 3, Oregon Constitution 11

OTHER AUTHORITIES

Merrill, F., *Abolishing Procedural Distinctions Between Actions At Law and Suits in Equity; Right to Jury Trial, ORCP 2*, in Oregon Law Institute, *1980 Civil Procedure Rules* (1979). 14

Ninth Circuit Model Jury Instruction (MCJI) 10.4A.1 32

Ninth Circuit Model Jury Instruction (MCJI) 10.4A.2 33

PETITIONER'S BRIEF ON THE MERITS

I. LEGAL QUESTIONS PRESENTED; PROPOSED RULES OF LAW

In its Order Allowing Review, the Court requested briefing on the following three questions:

1. If the jury finds that the employer discriminated or retaliated against the plaintiff for whistleblowing in violation of ORS 659A.199 but does not award monetary damages, and the trial court declines to reinstate the plaintiff, is the plaintiff generally entitled to other equitable relief?

Proposed Rule of Law: When a plaintiff seeks both monetary and equitable relief in a claim under ORS ch. 659A, and the jury returns a verdict in plaintiff's favor but awards no monetary relief, plaintiff is entitled to equitable relief.

2. When an injured worker employed by a state agency brings a claim against the agency under ORS 659A.046(1) for failing, upon demand, to reemploy the worker "at employment which is available and suitable," what must the worker establish for a prima facie case?

Proposed Rule of Law: Plaintiff's *prima facie* showing for a claim of failure to reemploy under ORS 659A.046(1) is that plaintiff had sustained a compensable injury, is disabled from performing the duties of the worker's former regular employment, had been medically released to return to work

(with or without restrictions), had made demand for reemployment and was not offered reemployment. To justify a *State administrative agency* employer's failure to reemploy an injured worker at a "suitable" job upon a demand for reemployment under ORS 659A.046, it is the employer's burden to prove that there was no "available and suitable" employment, either within its own agency or in any other agency of the executive or administrative department of the State of Oregon.

3. The trial court instructed the jury that, for a retaliation claim under ORS 659A.030(1)(f), plaintiff must prove that "the employer subjected the plaintiff to an adverse employment action." Was the court required to give a requested jury instruction defining "adverse employment action"?

Proposed Rule of Law: In the context of a retaliation claim under ORS 659A.030(1)(f), when the court, in its instruction to the jury, identifies the *actus reus* as an "adverse employment action," the court is required to instruct the jury what that means in the context of the specific claim, particularly when a proper instruction is requested.

II. NATURE OF PROCEEDINGS BELOW

Plaintiff, a former employee of the defendant, brought suit against defendant, alleging Racial Discrimination, Retaliation for Whistleblowing, and

Racial Intimidation, seeking economic and non-economic monetary damages and equitable relief. The case was tried to a jury in the Clackamas County Circuit Court. After the verdict, the trial court entered a judgment against the plaintiff, who appealed the judgment to the Court of Appeals. The Court of Appeals affirmed the judgment, and wrote an opinion addressing a single question that is not presently before this Court.

III. STATEMENT OF HISTORICAL AND PROCEDURAL FACTS

Petitioner relies on the facts as set forth in Appellant's Opening and Reply Briefs. *See* ORAP 9.20(4). For the convenience of the Court, they are attached hereto as Appendix B.

IV. SUMMARY OF ARGUMENTS

When, in a trial to a jury, a plaintiff seeks both monetary damages and equitable relief in a claim under ORS ch. 659A, and the jury finds that the plaintiff had indeed been aggrieved by defendant employer's unlawful employment action, plaintiff is entitled to relief. If the jury has awarded no relief by way of monetary damages, the court, based on that finding of liability, must award plaintiff equitable relief.

Plaintiff's *prima facie* showing for a claim of failure to reemploy is that plaintiff had sustained a compensable injury, is disabled from performing the

duties of the worker's former regular employment, had been medically released to return to work (with or without restrictions), had made demand for reemployment and was not offered reemployment. It is the employer's burden to prove that there was no "available and suitable" employment. If the employer is a State administrative agency, the employer's burden is also to prove that there was no "available and suitable" employment, either within its own agency *or* in any other agency of the executive or administrative department of the State of Oregon.

In the context of a retaliation claim under ORS 659A.030(1)(f), when the court, in its instruction to the jury, identifies the *actus reus* as an "adverse employment action," the court is required to instruct the jury what that means in the context of the specific claim, particularly when a proper instruction is requested.

V. ARGUMENT

Plaintiff relies on his briefing before the Court of Appeals, as supplemented herein. ER references are to the Excerpts of Record filed with plaintiff's briefing below. ORAP 9.20(4) and (5).

A. LEGISLATIVE INTENT

The Oregon legislature has not been at all unclear about its approach to

the problems inherent in discrimination against members of protected classes, including those classes defined by race and disability.

The express purpose of ORS chapter 659A is:

> [T]o encourage the fullest utilization of the available workforce by removing arbitrary standards of race, color, religion, sex, sexual orientation, national origin, marital status, age or disability as a barrier to employment of the inhabitants of this state, and to ensure the human dignity of all people within this state and protect their health, safety and morals from the consequences of intergroup hostility, tensions and practices of unlawful discrimination of any kind. . .To accomplish this purpose, the Legislative Assembly intends by this chapter to provide:
> * * *
> (2) An adequate remedy for persons aggrieved by certain acts of unlawful discrimination. . .

ORS 659A.003.

The legislature has also expressly declared its policy underlying its enactments:

> **ORS 659A.006 Declaration of policy against unlawful discrimination; opportunity to obtain employment without unlawful discrimination recognized as a civil right; exception of religious group**. (1) It is declared to be the public policy of Oregon that practices of unlawful discrimination against any of its inhabitants because of race, color, religion, sex, sexual orientation, national origin, marital status, age, disability or familial status are a matter of state concern and that this discrimination not only threatens the rights and privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.

The legislature has understood that the effects of discrimination in

employment are especially problematic:

> ORS 659A.006(2). The opportunity to obtain employment or housing or to use and enjoy places of public accommodation without unlawful discrimination because of race, color, religion, sex, sexual orientation, national origin, marital status, age or disability hereby is recognized as and declared to be a civil right.

ORS ch. 659A thus recognizes that it is difficult enough for people in our community who are members of those protected classes, and, in this case, persons of color and those who have suffered debilitating injury, to keep and maintain employment. The legislature has, in relatively recent years, taken a strong stand against hateful conduct directed at members of those protected classes. The provisions of ORS ch. 659A express the strong legislative intent to minimize the impact of discrimination in the workplace, to encourage people who are aggrieved by workplace discrimination to shine a light on it with their complaints, and to discourage retaliation against those employees who do.

The answers to the questions propounded by the Court, and the attendant analysis of the applicable statutory protections afforded to employees, must be informed by these expressions of legislative purpose.

B. EQUITABLE RELIEF

Question presented: If the jury finds that the employer discriminated or retaliated against the plaintiff for whistleblowing in violation of ORS

659A.199 but does not award monetary damages, and the trial court declines to reinstate the plaintiff, is the plaintiff generally entitled to other equitable relief?

Proposed Rule of Law: When a plaintiff seeks both monetary damages and equitable relief in a claim under ORS ch. 659A, and the jury returns a verdict in plaintiff's favor but awards no monetary relief, plaintiff is entitled to equitable relief.

Discussion

In this case, it is undisputed – or at least not reasonably disputable – that the jury found that the employer unlawfully retaliated against the plaintiff for whistle-blowing, in violation of ORS 659A.199. The jury was instructed:

> "Whistle blowing: To recover for whistle blowing, the plaintiff must prove, one, the plaintiff disclosed information the plaintiff reasonably believed was evidence that a public entity, A, violated a federal or state law, rule or regulation; B, engaged in mismanagement, gross waste of funds or abuse of authority; or, C, took an action resulting in substantial and specific danger to public health.
>
> "Two, 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 reported the information. Three, *the plaintiff was damaged as a result.*"

Tr. 3143 (emphasis added). The jury was asked, in the verdict form:

> 4. Did defendant take adverse employment action against plaintiff because he in good faith reported information that he believed was

a violation of a law, rule or regulation?

The jury answered "Yes."

The language of the instruction tracks the language of the whistle-blower statute, ORS 659A.199, which provides:

> **ORS 659A.199 Prohibited conduct by employer.** (1) It is an unlawful employment practice for an employer to discharge, demote, suspend or in any manner discriminate or retaliate against an employee with regard to promotion, compensation or other terms, conditions or privileges of employment *for the reason that the employee has in good faith reported information that the employee believes is evidence of a violation of a state or federal law, rule or regulation.* (Emphasis added).[1]

In returning its verdict, the jury plainly found that the defendant employer had engaged in the unlawful retaliatory employment practice prohibited by the statute. In answer to the next question, the jury answered that plaintiff should be awarded no monetary damages. ER - 72.

The question posed by this Court is whether the finding that defendant had engaged in the unlawful employment practice entitles plaintiff to *some*

---

[1] The whistle-blower instruction, as it regards the prohibited employer action, was couched in terms of the statutory language as well: "the defendant discharged, demoted, suspended or discriminated or retaliated against the plaintiff with regard to any term, condition or privilege of employment. . .". Tr. 3143. In the verdict form the shorthand term "adverse employment action" was substituted for the statutory language. ER - 72. In the context of ORS 659A.199, an adverse employment action is one that is a retaliatory action that "materially affects the terms, conditions or privileges of employment."

kind of equitable relief. There are a number of different ways of approaching the question, all of which lead to the same affirmative conclusion.

In *Ballinger v. Klamath Pac. Corp.*, 135 Or. App. 438, 898 P.2d 232 (1995), plaintiff filed an action seeking equitable relief, pursuant to former ORS 659.121[2], alleging an unlawful employment practice, *viz.*, sex discrimination, under former ORS 659.030.[3] The case was tried to the court, which concluded that plaintiff had indeed been sexually harassed and, therefore, aggrieved by an unlawful employment practice prohibited by statute, namely, sex discrimination, in violation of ORS 659.030. The court, however, denied any relief because plaintiff had not done enough to resolve the matter on her own. *Ballinger, id.* at 446. The court of appeals reversed, holding that there was no requirement in the law that an aggrieved plaintiff make "reasonable efforts" to resolve the problem before leaving their employment. *Id*. at 447. Rather, the court held that "[p]laintiffs either establish discrimination or they

---

[2] Former ORS 659.121 (set out in full at Appendix C) has been retooled and renumbered as ORS 659A.885, adding ORS 659A.199 to the list of statutory violations for which a civil action will lie. ORS 659A.885(2). *See* Appendix D. For the purposes of this discussion, however, they are functionally equivalent.

[3] Under former ORS 659.121(1), the only remedies awardable for sex discrimination under ORS 659.030 were equitable.

do not. Here, they did. *Once discrimination is established, plaintiffs are entitled to relief under ORS 659.121*." *Id.*, at 448 (emphasis added).

Former ORS 659.121, the provision under consideration in *Ballinger*, established procedures for civil actions seeking relief from the enumerated unlawful employment practices, including, but not limited to, sex discrimination under former ORS 659.030, among others. Nothing in the Ballinger decision suggests that should be read as being limited to sex discrimination claims, but, rather, it must be seen as being applicable to all of the statutory unlawful employment practices enumerated. The same is true of ORS 659A.885.[4]

To say that the plaintiff is *entitled* to relief necessarily implies that the

---

[4] The analysis in *Ballinger*, under former ORS 659.121, is applicable to claims, such as those in this case, brought under current ORS 659A.885. In 2001, former ORS 659.121 was renumbered and expanded as ORS 659A.885. The operative language regarding equitable relief in the two statutes is practically identical.

ORS 659.121(1): "Any person claiming to be aggrieved. . .may file a civil suit in circuit court for *injunctive relief* and the court may order such *other equitable relief as may be appropriate, including but not limited to reinstatement or the hiring of employees with or without backpay*."

ORS 659A.885(1): "In any action under this subsection, the court may order *injunctive relief* and any *other equitable relief that may be appropriate, including but not limited to reinstatement or the hiring of employees with or without back pay*."

court does not have the discretion to deny relief once the unlawful employment practice has been established. The same reasoning applies in the present case, in which the jury found that plaintiff had in fact been aggrieved by the unlawful employment practice, in this case, whistleblower retaliation, under ORS 659A.199.Therefore plaintiff was entitled to relief.

As to what that relief might be, the jury did find that monetary relief was not warranted, but that was only part of the relief requested. A finding of monetary damage is not a prerequisite to the entitlement to equitable relief.[5] *See*, *e.g.*, *Ballinger*, *supra*. The jury was not asked about equitable relief, nor was equitable relief something within the jury's province, and the parties and the court all proceeded on the assumption that equitable relief was something the court would deal with later. Once the monetary relief had been denied by the jury, the only relief left available – and to which plaintiff was entitled, since

---

[5] A thought experiment: Suppose the complaint sought only equitable relief. By the plain terms of the statute, a party would still be entitled to a jury trial, even though the nature of the equitable relief sought is a matter for the court, and suppose further that the jury found that the employer had committed a whistleblower violation. Would the court, in determining the matter of equitable relief, be free to ignore the jury's factual determination? If it were, what would that do to the statutory (ORS 659A.885(3)) and constitutional (Article I, section 17, and Article VII (Amended), section 3, of the Oregon Constitution) rights to a jury trial?

the jury's finding had established the unlawful employment practice – was equitable relief.

The remaining question is the impact of the jury's find that defendant had committed the unlawful employment parctice of whistleblower retaialtion, in violation of ORS 659A.199. While the trial court has undoubtd discretion regarding the crafting of equitable remedies, the court's discretion in a case in which a jury has already determined the facts is constrained by those facts, and is limited to the *kind* of equitable relief rather than the *entitlement* to equitable relief. *See*, *e.g*, *Ballinger,* 135 Or. App. at 450 n. 10 ("A court in equity has broad discretion in *crafting* relief." (Emphasis added).). The jury's determination of those facts are binding on the court. *See M.K.F. v. Miramontes*, 352 Or. 401, 427 n.18, 287 P.3d 1045 (2012), *citing Bishop v. Baisley*, 28 Or. 119, 142-44, 41 P 936 (1895) (equity court defers to jury on factual questions).

This Court, in *M.K.F*, did not squarely address the issue, but did identify it. The case was concerned with the obverse of the issue in this case. In *M.K.F.*, petitioner sought both a stalking protective order and a judgment for compensatory money damages. The trial court conducted the trial without a jury, over defendant's objection, and found for plaintiff, granting the SPO as

well as compensatory damages. After affirmance by the Court of Appeals, this Court reversed that part of the appellate decision with regard to the right to jury trial on the claim for compensatory damages and reversed the circuit court's judgment as to compensatory damages, holding, essentially, that the defendant had the right to a jury trial on the claim for compensatory damages.

In doing so, the court relied in large measure on the apparently quite persuasive, if not binding, decision of the U.S. Supreme Court in *Dairy Queen v. Wood*, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962), in which the plaintiff sought an accounting for an alleged trademark infringement and requested both monetary and injunctive relief. The Court held that the respondents' claim for a money judgment was a legal claim, and petitioner was accordingly entitled under the Seventh Amendment to a jury trial on that claim. To protect the right to a jury trial, the Court explained in *Dairy Queen,* 369 U.S. at 472-73.

> “the legal issue must be determined prior to final resolution of the equitable issues. In that regard, quoting from its decision in *Beacon Theatres, Inc. v. Westover*, 359 US 500, 510-11, 79 S Ct 948, 3 L Ed 2d 988 (1959), the Court held that ‘only under the most imperative circumstances [which in view of the flexible procedures of the Federal Rules we cannot now anticipate,] can the right to a jury trial of legal issues be lost through prior determination of equitable claims.’”

M.K.F. at 417-18 (bracketed material reinserted at ellipsis).

The Court ultimately adopted the *Dairy Queen* standard – the right to jury trial must depend on the nature of the relief requested on an issue-by-issue basis, *id*. at 425 – and recognized that the implications of that decision were not without some consequence. Quoting Professor Frederic R. Merrill, *Abolishing Procedural Distinctions Between Actions At Law and Suits in Equity; Right to Jury Trial, ORCP 2*, in Oregon Law Institute, *1980 Civil Procedure Rules* (1979), the court wrote:

> "In his 1980 Oregon Law Institute article, *Abolishing Procedural Distinctions Between Actions at Law and Suits in Equity*, Merrill discussed how the substantive constitutional right to a jury trial would be determined under the new procedural regime, and wrote, 'Under our modern system, elements are incorporated into one case which historically would have required separate cases in law and equity. The availability of jury trial must be separately determined for different issues when a case arises presenting both legal and equitable issues. * * * Some issues in the same case may involve a right to jury trial while others do not.' Merrill, *Abolishing Procedural Distinctions* at 227.
>
> "Merrill noted that, when both equitable and legal issues arise in the same case, the order in which those issues are decided could have constitutional implications. In that regard, Merrill cited *Dairy Queen* and *Beacon Theatres* and cautioned that
>
> > "'some care is necessary in order of trial in mixed law and equity cases because of the constitutional right to jury trial. If there are overlapping factual issues between a legal claim and an equitable defense * * *, having the court pass on the defense first would settle those factual issues and bind the jury. If under the

> historical test the plaintiff actually would have been able to maintain an action at law and have the jury pass on those factual issues, the result may be a denial of the right to jury trial. * * * The question of order of trial should not be allowed to obscure the question of right to jury trial.' *Id*. at 227."

M.K.F., 352 Or. at 421-422.

The federal courts have been attentive to these concerns. The "presumptive rule" in federal cases involving mixed law-equity issues sounds very much like an issue-preclusion rule: "the first factfinder binds the second on factual issues actually litigated and necessary to the result." (*Troy v. Bay State Computer Group, Inc*. 141 F.3d 378, 383 (1st Cir. 1998)). Where legal claims are first tried by a jury and equitable claims later tried by a judge, the trial court must follow the jury's factual determinations on common issues of fact. *Los Angeles Police Protective League v. Gates,* 995 F.2d 1469, 1473 (9th Cir. 1993). The reasons for that general rule are readily apparent. The United States Supreme Court has also not surprisingly likened the situation to issue preclusion (collateral estoppel), in which a party is precluded from relitigating an issue tried in a prior action. (*Beacon Theatres v. Westover*, 359 U.S. at 503-8. There are, additionally, solid policy reasons for giving one fact finder's determinations binding effect in a mixed trial of legal and equitable issues. The

rule minimizes inconsistencies, and avoids giving one side two bites of the apple. The rule also prevents duplication of effort. Were the equitable issues to be tried first, the right of the party to a jury trial on the legal issues would be either compromised or eliminated entirely. *See, e.g.*, *Hoopes v. Dolan*, 168 Cal. App. 4th 146, 158, 85 Cal. Rptr. 3d 337, 345-346 (2008).

Finally, the Court in *M.K.F.*, 352 Or. at 427 cautioned the trial court on remand to be mindful of these matters: "On remand, the trial court may be asked to consider whether its entry of the stalking protective order or its findings of fact in support of that order will have any effect on defendant's right to have the jury decide plaintiff's claim for compensatory damages," pointing, by way of example, to *Bishop v. Baisley*, 28 Or. at 142-44 (equity court defers to jury on factual questions).[6]

Consequently, given the jury's findings of fact,[7] the court is stuck with the conclusion that the unlawful employment practice was established. The trial court doesn't have the discretion to second-guess the jury and decide otherwise. Looping back to *Ballinger*, if the jury's establishment of

---

[6] In fact, on remand, the parties settled before retrial. See Appendix E.

[7] The court certainly did not purport to make any additional or contrary findings of its own

discrimination entitles plaintiff to relief, the trial court is without the discretion to deny him the only relief available. Nonetheless, the court does have the discretion to determine what form the equitable relief should take. *That* discretion is quite broad:

> "A court in equity has broad discretion in *crafting* relief. *See, e.g., Ballinger v. Klamath Pacific Corp*., 135 Or. App. 438, 450 n 10, 898 P.2d 232, *rev den*, 322 Or. 360 (1995) ('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.'). Moreover, parties in equity are not necessarily limited to the relief that they seek in their complaint. *See Does 1 7 v. State of Oregon*, 164 Or. App. 543, 548, 993 P.2d 822 (1999), rev den, 330 Or. 138, 6 P.3d 1098 (2000); ORCP 67 C."

Port of Morrow v. Aylett, 186 Or. App. 70, 76, 62 P.3d 427 (2003) (emphasis added).

In conclusion, we return to the question posed by the Court: If the jury finds that the defendant did take adverse employment action against plaintiff because he in good faith reported information that he believed was a violation of a law, rule or regulation, does the court have discretion to entirely deny any relief?

Ballinger would seem to say no, at least not in the context of remediation for an unlawful employment practice. All of the other considerations militate in

favor of the primacy of the jury's findings. The court does have the discretion to determine what kind of equitable relief would be appropriate, but once the unlawful retaliation has been found, the court does not have the discretion to deny any and all relief, and, in determining what equitable relief is appropriate, is not constrained by the equitable relief specifically requested by plaintiff.

C. REEMPLOYMENT

Plaintiff primarily relies, for his answer to this question on his argument before the Court of Appeals, supplemented as follows.

First, the structure of the regulatory scheme places no burden on the employee to do anything other than make the appropriate demand for reemployment and then to follow the instructions of the employer. There is no obligation placed on the the injured worker to find his own suitable job. *See Robinson v. School Dist*., 92 Or. App. 627, 630, 759 P.2d 1116 (1998), *citing Carney v. Guard Publishing Co.*, 48 Or App 147, 152, 616 P.2d 548, *modified on other grounds*, 48 Or App 927, *rev den* 290 Or 171 (1980). Rather, the burden is on the employer to identify and offer a suitable position when one becomes available. *See* OAR 839-06-0135(6). This is only logical. As the District Court noted in *Bain v. Tri County Metro. Transp. Dist.*, 1993 U.S. Dist. LEXIS 13413, *11-12 (D. Or. 1993): "[T]he burden of investigating potential

openings within Tri-Met for which Bain might be suited does not rest entirely with Bain, who may or may not have adequate access to all openings available." The Ninth Circuit, in an unpublished opinion, reversed. In dissent, Judge Nelson wrote: "By holding that Bain has failed to meet his burden with respect to damages, we are placing an impossible burden upon him. After all, the employee is in no position to know what jobs are available." 1996 U.S. App. LEXIS 4831, *7 (9th Cir. 1996). While the decisions are by no means authoritative, the observations are pertinent. Since the evidence of the availability of suitable jobs – in this case, within the agency *or* within the entire state-wide system – is uniquely within the knowledge and control of the defendant employer, placing the burden on the employee to prove the non-existence of a suitable job places yet another barrier to disabled workers' reentry into the work force which, again, negates the entire purpose of the statute.

Secondly, plaintiff was injured and was released to return to work, with only one restriction: "No work at OLCC." Tr. 2246. Def. Ex 194. He demanded reemployment. Tr. at 1257-8. The only reemployment he was offered was plainly not suitable. *See* Appellant's Br. at 39-40. This frames the issue. Since the restriction precluded work at the OLCC, defendant had no choice but to

resort to the state injured workers pool to fulfill its obligation under the statute, as was required by its own rules.

For his part, the current BOLI regulations provide that after making the demand for reemployment, the employee’s obligations are limited. “At the time of the injured worker's demand for reemployment, a suitable position may not be available. When this occurs, the injured worker must follow the employer's reporting policy *until the employer offers the injured worker an available, suitable position*.” OAR 839-06-0135(6) (emphasis added). The regulation requires the employer to at least be paying attention to the availability of suitable employment, and, taken together with the statutory directive, to offer the job to the employee when it becomes available. Which is to say, the only burden on the employee is to wait patiently; there is no affirmative duty placed on an employee to find his own job with the employer (or, in this case within the state employment system). There is a burden placed on the employer to be aware of the availability of suitable reemployment so that the employer can offer the suitable job to the employee when it becomes available. OAR 839-06-0135(6).

The complicating feature in the present case is that plaintiff’s job restriction essentially assured that there *must* be recourse to the state injured

workers pool, since a job within OLCC that is consistent with a “No work at OLCC’ medical restriction would seem to be difficult to find. Defendant, by its own testimony, acknowledged that it never employed the only tool that its bureaucracy had to facilitate plaintiff’s reemployment. It, in essence, ignored plaintiff’s demand for reemployment entirely.

To allow that kind of flouting of the plain requirements of law would permit an employer to discriminate against an injured worker seeking reemployment by simply doing nothing, to sit on its corporate hands in the hope that the employee goes away, gets employed elsewhere or dies before he asks any questions; it is all too easy for an employer to thwart the requirements of the law by its intentional inaction.

As has been discussed, the very comprehensive regulatory environment implementing ORS 659A.046[8] and 659A.052 has determined what is required of employers in general and state employers in particular. *See* OAR 839-06-100 - 165; Appellant’s Br. at 38-9 and Appendix 2. Consistently with those

---

[8] An injured State employee who has been medically released to return to work has a right to reinstatement or reemployment upon demand at any available and suitable position in any agency of the executive or administrative department. *See* ORS 659A.046(1), .052; *see Robinson*, 92 Or. App. at 630 (upon demand, “the employer must offer the employee a suitable job when it becomes available.”)

regulations, ORS 659A.046 should be construed to incorporate the requirements of ORS 659A.052, and similarly construed to make failure of a state agency employer to have done *anything* that is required of such employer given a demand for reemployment should be considered an unlawful employment practice.

D. JURY INSTRUCTION

A trial court's refusal to instruct the jury on what retaliation is makes it very difficult for a litigant to successfully bring a claim for retaliation into court. Anti-retaliation provisions, such as those found in ORS ch. 659A (*see*, *e.g*., ORS 659A.030(1)(f)) are central to the purpose of eliminating workplace discrimination. *See Burlington Northern & Santa Fe Ry. v. White*,, 548 U.S. 53, 63-4, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). The court's unwillingness to define "adverse employment action" had the effect of precluding the jury from any meaningful consideration of the claim.

Question 3. The trial court instructed the jury that, for a retaliation claim under ORS 659A.030(1)(f), plaintiff must prove that "the employer subjected the plaintiff to an adverse employment action." Was the court required to give a requested jury instruction defining "adverse employment action"?

Proposed Rule of Law: In the context of a retaliation claim under ORS

659A.030(1)(f), when the court, in its instruction the jury, identifies the *actus reus* as an "adverse employment action," the court is required to instruct the jury what that means in the context of the specific claim, particularly when a proper instruction is requested.

Discussion

ORS 659A.030(1) declares it to be an unlawful employment practice

> (f) For any person to discharge, expel *or otherwise discriminate against* any other person because that other person has opposed any unlawful practice, or because that other person has filed a complaint, testified or assisted in any proceeding under this chapter or has attempted to do so.

The narrow question addressed here is whether the jury instruction on plaintiff's retaliation claim under ORS 659A.030(1)(f), which couched the employer's actions solely in terms of "adverse employment action," adequately reflected the statutory "otherwise discriminate against" language, which is broader than the kind of "adverse employment action" addressed by the whistleblower instruction under ORS 659A.199. A jury instruction that does not make that distinction, like the one at issue in this case, is insufficient.

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

> "Retaliation, elements and burden of proof: The plaintiff

> seeks damages against the defendant for retaliation. The plaintiff has the burden of proving each of the following elements by a preponderance of the evidence.
>
> "One, the plaintiff engaged in or was engaging in an activity protected under law; that is, opposing or reporting racial discrimination and/or harassment in the workplace.
>
> "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.
>
> "If you find that the plaintiff has proved all three of these elements, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove any of these elements, your verdict should be for the defendant."

Tr. at 3148 (emphasis added).[9]

The corresponding line on the verdict form asked:

> 3. Did defendant retaliate against plaintiff for opposing or reporting racial discrimination or racial harassment?

ER - 72.

The term "adverse employment action" was used twice in the instruction, without any explanation of what that might have meant,[10] and it was not

---

[9] Neither party excepted to this instruction. Tr. at 3226-7.

[10] In fact, there was nothing anywhere in any of the jury instructions defining "adverse employment action." Tr. 3137-55. The court, after hearing the arguments of the parties, simply would not decide between the parties' competing requested instructions, and, agreeing with defendant's suggestion, Tr. 3066-7, 3067-8, 3068-9, declined to give any instruction at all:

mentioned at all in the corresponding line on the Verdict form.

The only other place "adverse employment action" is mentioned is in #4 of the verdict form, which corresponds to the whistleblower claim. There, as discussed above, the court had instructed:

> "Whistleblowing: To recover for whistle blowing, the plaintiff must prove, one, the plaintiff disclosed information the plaintiff reasonably believed was evidence that a public entity, A, violated a federal or state law, rule or regulation; B, engaged in mismanagement, gross waste of funds or abuse of authority; or, C, took an action resulting in substantial and specific danger to public health.
>
> "Two, 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 reported the information. Three, the plaintiff was damaged as a result."

Tr. 3143. On the verdict form, the jury answered Yes to question 4. relating to that claim:

> 4. Did defendant take *adverse employment action* against plaintiff because he in good faith reported information that he believed was a violation of a law, rule or regulation?

ER - 72 (emphasis added).

> THE COURT: I'm not going to give either of your definitions. I think the jury will be able to determine this on their own, so I'm going to decline to give an adverse employment action instruction.

Tr. 3069.

The difficulty is that "adverse employment" action is a term with legal significance, and its definition is different depending on its context, but, particularly with regard to the retaliation claim, the trial court left the term undefined.

The absence of a definition of "adverse employment action" with regard to the whistleblower claim was perhaps less glaring. The court had instructed the jury that the defendant employer may be liable for its actions if "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 reported the information." Tr. 3143. Note that the instruction does not denominate the action as an "adverse employment action."

In the verdict form, the action upon which liability could be predicated was described as an "adverse employment action," so it may – or may not – be that the jury understood that the "adverse employment action" in the verdict form was the same as the employment-related actions of the defendant described in the instruction.

However, not even that level of clarity was provided in the Instruction/Verdict pairing for the Retaliation claim, in which "adverse

employment action" was used in the Instruction, but was not further clarified, and the Verdict form gave no additional insight into what "adverse employment action" might have meant in *this* context. In this, as in so many other things, "Context matters." *Burlington Northern,* 548 U.S. at 69.

In claims for discrimination, for example, the statutory language itself prohibits employers from "*refus*[*ing*] *to hire or employ* the individual or *to bar or discharge the individual from employment*," or "discriminat[ing] against the individual *in compensation or in terms, conditions or privileges of employment*," based on the individual's protected characteristics. ORS 659A.030(a), and (b) (emphases added). Similarly, in a whistleblower claim under ORS 659A.199, the statute provides that the employer may not "discharge, demote, suspend or in any manner discriminate or retaliate against an employee *with regard to promotion, compensation or other terms, conditions or privileges of employment*." (emphasis added). All of the proscribed actions of the employer in such cases – those "adverse employment actions" – ultimately depend on their effecting "a significant change in employment status." *See Meyer v. State*, 292 Or. App. 647, 679 n. 10, 426 P.3d 89 (2018), citing *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998).

In contrast, in retaliation claims under ORS 659A.030(1)(f),[11] such as the one at issue herein, the prohibited employer action is defined more broadly – "discharge, expel *or otherwise discriminate against"* – which has been construed by the courts as any action which could well dissuade a reasonable worker from making or supporting a charge of discrimination, and is not limited to actions that impact the terms and conditions of employment. That understanding is derived from the broader standard for retaliation claims brought under 42 USC §2000e-3(a) (Title VII). As the Court of Appeals explained in *Meyer*, 292 Or. App. at 679:

> "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* [*v. Portland State Univ.*], 352 Or. [697], at 712-13[, 291 P.3d 658] (2012) (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

---

[11] ORS 659A.030 Discrimination because of race, color, religion, sex, sexual orientation, national origin, marital status, age or expunged juvenile record prohibited. (1) It is an unlawful employment practice: (f) For any person to *discharge, expel or otherwise discriminate against any other person* because that other person has opposed any unlawful practice, or because that other person has filed a complaint, testified or assisted in any proceeding under this chapter or has attempted to do so.

> 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). 'Context matters' when determining whether an action is materially adverse. *Id*. at 69."

(emphasis added). *See also Hess v. Multnomah County*, 216 F. Supp. 2d 1140, 1152 (D. Or. 2001) ("Because ORS Chapter 659 'was modeled after Title VII. . .federal cases interpreting Title VII are instructive.'"), *quoting Harris v. Pameco Corp*., 170 Or. App. 164, 176, 12 P.3d 524 (2000); *Mains v. II Morrow, Inc*., 128 Or. App. 625, 634, 877 P.2d 88 (1994) ("Because Title VII was the basis for ORS 659.030, the federal cases are instructive"); *Coszalter v. City of Salem*, 320 F.3d 968, 976 (9th Cir. 2003) (retaliation claims under the First Amendment utilize the same "reasonably likely to deter" standard as Title VII).

Consistently with that understanding, the Bureau of Labor and Industries, which is charged with the interpretation, enforcement and administration of ORS ch 659A (*see* ORS 659A.805, *et seq*.) has interpreted

ORS 659A.030(1)(f) as incorporating the *Burlington Northern* standard.[12] *See* OAR 839-005-0125 (renumbered from OAR 839-005-0033 (cert. ef. 1-1-12)), which defines adverse employment action, in the context of a retaliation claim, in just those terms:

> (b) The [employer] has subjected that other person to *any adverse treatment, in or out of the workplace, that is reasonably likely to deter protected activity, regardless of whether it materially affects the terms, conditions, or privileges of employment*[.]

(emphasis added).

As noted above, "adverse employment action" is not defined in the statute. Nor is it a term defined in any of the jury instructions. Its utilization without a definition is, at very least, confusing to a jury, particularly given that its meaning changes depending on the particular claim, and, in this case, its meaning in the retaliation claim is broader than its meaning in the whistleblower claim.

In the whistleblower instruction, all of the prohibited actions of the employer described were those that would have effected a "significant change

---

[12] While not binding on the court, the Bureau's interpretation of the statute is entitled to the court's "careful consideration." *Van Ripper v. Liquor Cont. Com.*, 228 Or. 581, 593, 365 P.2d 109 (1961); *see Knapp v. City of North Bend*, 304 Or. 34, 41, 741 P.2d 505 (1987).

in employment status," in the language of *Ellerth*. The associated question on the verdict form, #4, couched the question in terms of "adverse employment action." On that question, the jury found in favor of plaintiff.

When the court instructed the jury on the retaliation claim, it used the term "adverse employment action," without defining it. The verdict form, at #3, only referred to "retaliation," without any elaboration. The confusion lies in the fact that the meaning of adverse employment action in the retaliation context is broader than the definition in the whistleblower context. Yet, the only description of what an adverse employment action *might* be is found – if it may be found anywhere – in the far narrower whistleblower instruction. The potential for confusion is unavoidable. There is no way that a jury hearing the case and the instructions given could possibly have understood what kind of adverse employment action was applicable to the retaliation claim under ORS 659A.030(1)(f). That contextual difference was completely missed by the trial court.

Turning finally to the instructions themselves, "[a] party is entitled to a jury instruction on its theory of the case if the requested instruction correctly states the law, is based on the operative pleadings, and is supported by the evidence," *State v. Williamson*, 214 Or App 281, 285–286, 164 P3d 315

(2007)). It is reversible error to refuse to give the requested instructions if the jury instructions given by the trial court, considered as a whole, cause prejudice to the party requesting the instruction. *Hernandez v. Barbo Mach. Co.*, 327 Or. 99, 106, 957 P.2d 147 (1997).

Both parties agreed that an instruction was appropriate. The court did note that an adverse employment action instruction should be given. Tr. at 3016. Plaintiff and defendant offered competing jury instructions on what constitutes "an adverse employment action" for the purposes of the retaliation claim. Plaintiff proposed the following instruction:

> 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 instruction was based on *Burlington Northern,*548 U.S at 68, and *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir 2000). Plaintiff also proposed the very similar Ninth Circuit Model Jury Instruction (MCJI) 10.4A.1, which 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.

In support of those instruction plaintiff also relied on *PSU Association of University Professors*, 352 Or. 712-13, for it square adoption of the broader Title VII standard applied to retaliation claims as articulated in *Burlington Northern*.

For its part, relying on Ninth Circuit Model Jury Instruction (MCJI) 10.4A.2, defendant proposed the following:

> "An action is an adverse employment action if it materially affects the terms, conditions or privileges of employment."

Tr. at 3014.[13]

Defendant's proposed instruction, identifying adverse employment action as relating solely to the "terms, conditions and privileges of employment," was, as has been discussed, an inaccurate statement of the law as applied to a retaliation claim under ORS 659A.030(1)(f).[14] On the other hand,

---

[13] Defendant actually agreed that the Title VII based instruction proposed by plaintiff "could be used" had this been a standalone retaliation claim. Tr. 3052

[14] In doing so, defendant made the same mistake as was identified by the court in *Meyer*, 292 Or. App. at 679 n 10, *viz.*, relying on the standard for

either of Plaintiff's proposed jury instructions was an accurate statement of the law and was supported in the evidence. The failure to give the instruction – or any instruction – was erroneous and prejudicial. Plaintiff's requested instruction accurately tracked the language under the *Burlington Northern/Meyer/*BOLI standard.

The court heard argument on the instructions and declined to give any instruction at all on this element of plaintiff's claim, observing that the jury can determine what it means on their own, to which plaintiff duly excepted. Tr. 3069, 3227.

The court is required to instruct the jury about what conduct of defendant will render it liable. Instructing the jury that proof of an "adverse employment action" is required, without telling them any more about it and figuring that they can figure it out for themselves is simply inadequate, since, taking the instructions as a whole, the jury had no way of knowing that adverse employment action in the context of a claim under ORS 659.030(1)(f) had meaning broader than that under ORS 659A.199.[15]

---

discrimination claims rather than the standard for retaliation claims.

[15] This kind of instructional confusion could be avoided if the court would simply decline to use the term "adverse employment action," and instead use the operative definitions. On the other hand, the court could properly use

The court's failure to give the instruction was erroneous, and it "'probably created an erroneous impression of the law in the minds of the members of the jury and. . .that erroneous impression may have affected the outcome of the case.'" *Beall*, 186 Or. App. at 703; *Hernandez*, 327 Or. at 106.

VI. CONCLUSION

For the reasons set forth above, and those advanced in Appellant's Brief before the Court of Appeals, Petitioner respectfully requests that this court reverse the judgment of the trial court and remand the case for a new trial.

Dated 20 June, 2019.

/s/ Michael E. Rose
Michael E. Rose OSB#753221
Of Attorneys for Petitioner on Review

---

the term "adverse employment action," so long as it defines the term appropriately for each claim. Unfortunately, in this case, the court did neither.

CERTIFICATE OF COMPLIANCE

I certify that (a) this Petitioner's Brief on the Merits 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 7923 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.

/s/ Michael E. Rose
Michael E. Rose OSB#753221
Of Attorneys for Petitioner on Review

CERTIFICATE OF FILING and SERVICE

I certify that on 20 June, 2019, I filed the original foregoing PETITIONER'S BRIEF ON THE MERITS with the Appellate Court Administrator to be filed with this Court and to be served upon the following counsel through the eFiling system.

I further certify that on the same date I served the foregoing PETITIONER'S BRIEF ON THE MERITS by sending two copies thereof via United States Postal Service First Class Mail and addressed to the following party and Amicus:

ELLEN ROSENBLUM, OSB #753239
Attorney General
Ellen.F.Rosenblum@doj.state.or.us
COLM MOORE #051750
Senior Assistant Attorney General
colm.moore@doj.state.or.us
DEPARTMENT OF JUSTICE
400 Justice Building
1162 Court Street NE
Salem, Oregon 97310

CAITLIN VAN TASSEL MITCHELL
Johnson Johnson Lucas et al
975 Oak St., Suite 1050
Eugene, OR 97401

/s/ Michael E. Rose
Michael E. Rose OSB#753221
Of Attorneys for Petitioner on Review