

IN THE SUPREME COURT OF THE STATE OF OREGON

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GENE SUMMERFIELD,

Plaintiff-Appellant,  
Petitioner on Review,

v.

OREGON LIQUOR CONTROL  
COMMISSION,

Defendant-Respondent,  
Respondent on Review.

Clackamas County Circuit  
Court No. CV12100185

CA A157108

SC S066377

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BRIEF ON THE MERITS OF RESPONDENT ON REVIEW,  
OREGON LIQUOR CONTROL COMMISSION

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Review of the Decision of the Court of Appeals on Appeal from a  
Judgment of the Circuit Court for Clackamas County  
Honorable KATHERINE E. WEBER, Judge

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Opinion Filed: October 17, 2018  
Before: DeVore, PJ, Garrett, Judge, and James, Judge

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**QUESTIONS PRESENTED AND PROPOSED RULES OF LAW**

**First Question Presented**

When a jury finds that an employer took adverse action against a plaintiff for whistleblowing, the trial court has discretion to award “appropriate” equitable relief. If the jury finds that the employer retaliated against the plaintiff for whistleblowing but did not suffer monetary damages, and the trial court declines to reinstate the plaintiff, is the trial court required as a matter of law to grant plaintiff other equitable relief?

**First Proposed Rule of Law**

No. The trial court does not abuse its discretion if it declines to grant equitable relief when the plaintiff requests relief that is not appropriate. Requested relief is not appropriate if it is not aimed at eliminating unlawful discrimination or at making the plaintiff whole for the employer’s unlawful action.

**Second Question Presented**

Under ORS 659A.046, an agency is required, upon demand, to reemploy an injured worker “at employment which is available and suitable.” In a failure-to-reemploy claim against the agency, does the worker bear the burden of establishing that suitable employment was available?

**Second Proposed Rule of Law**

Yes. The injured worker has the burden of producing evidence on all essential elements of a statutory reemployment claim under ORS 659A.046. Because the availability of suitable employment is an essential element of a reemployment claim, the plaintiff has the burden of production and persuasion as to that issue.

**Third Question Presented**

When the trial court instructs a jury that, for a retaliation claim under ORS 659A.030(1)(f), the plaintiff must prove that “the employer subjected the plaintiff to an adverse employment action,” is the court required to give a requested jury instruction that defines “adverse employment action” as an action that might have dissuaded a reasonable worker from making or supporting a claim of discrimination?

**Third Proposed Rule of Law**

No. Such an instruction incorrectly states the law, because it informs the jury that an action is retaliatory under ORS 659A.030(1)(f) if the action *possibly* dissuaded the plaintiff from pursuing his or her rights under ORS chapter 659A. The correct statement of the law is that an employer retaliates if the employer took action that *more likely than not* dissuaded the plaintiff from pursuing his or her rights under ORS chapter 659A.

## **FACTUAL AND PROCEDURAL BACKGROUND**

The following section provides a general overview of the relevant historical facts and the procedural background of the case. Because the three questions on review involve distinct claims and distinct rulings by the trial court, additional facts and background related to each question are included as necessary in the relevant argument sections.

### **A. OLCC Distribution Warehouse and Plaintiff's Promotion**

OLCC regulates the distribution of liquor and distilled spirits. Every bottle of liquor or distilled spirits goes through the OLCC warehouse before being distributed to retailers, and between 10,000 and 14,000 cases of liquor pass through the warehouse daily. (Tr 2405-06). Cases of liquor arrived wrapped in twine, which workers routinely tied in loops with slipknots to anchor racking, to hold clipboards, and to bundle pallets and boxes. (Tr 873-74, 1027, 1039, 1765).

OLCC initially hired plaintiff, an African-American man, in 2007 as a temporary employee in its distribution warehouse. Management considered him a good employee and promoted him to a permanent entry-level position. (Tr 2544-45). In October 2008, plaintiff was promoted to an equipment operator position and received a higher rate of pay. (Tr 1321, 2546-47). All equipment operators are required to have a commercial driver's license (CDL),

but plaintiff failed to acquire his CDL. He self-demoted in 2009, but retained his higher rate of pay. (Tr 2550).

### **B. Plaintiff's Discrimination Complaint**

In March 2011, plaintiff filed a complaint with OLCC Human Resources, raising a number of allegations of racial discrimination. (Tr 699, 702-07, 722, 725). Plaintiff complained that OLCC employees had used derogatory and racist language in the warehouse, including “spearchucker,” “wetback”, and the “N word.” (Tr 704-06). He also alleged that two workers used the “Heil Hitler” salute to greet each other, and that someone had put a sign on his locker that said, “Join the Exclusive OLCC is Gonna Buy Me A House Club.” (Ex 31; Tr 705-06). And, he complained generally that he had missed out on promotional opportunities, had been “ostracized,” and had been the subject of other mistreatment by coworkers in the warehouse. (Tr 699, 706).

Smith, an OLCC human resources manager, met with plaintiff, and plaintiff stated the reasons that he felt he was not being treated fairly. (Tr 707, 725-26). Smith subsequently interviewed 17 individuals to determine whether any unlawful discrimination had occurred. (Tr 727-28, 838). Smith discovered that some of the alleged conduct had taken place as plaintiff alleged, including the derogatory and racist language in the warehouse, but that none of that conduct had been directed at plaintiff. (Tr 822, 824-26). OLCC management had previously reprimanded the offending employees, and taken other

corrective actions to address that behavior. (Tr 825, 2137-40, 2555). Smith could not substantiate some of plaintiff's allegations, and as for the substantiated conduct that was directed at plaintiff, Smith determined that those actions were not motivated by racial discrimination. (Ex 50; Tr 710).

### **C. The BOLI Complaint and Subsequent Events**

In April 2011, plaintiff filed a complaint with the Bureau of Labor and Industries (BOLI) and the Equal Employment Opportunity Commission, reiterating allegations that plaintiff had made to OLCC. (Ex 113). BOLI interviewed various coworkers. In April 2012, BOLI dismissed the complaint for lack of sufficient evidence to continue the investigation and issued a right-to-sue letter. (Ex 114).

On May 10, 2012, plaintiff reported that he had discovered a noose tied with twine near one of the conveyor belts, which was located near the receiving dock. (Tr 1189-90, 1437-38). The noose was attached to racking, and the looped portion was hanging about four feet off the ground. (Exs 84, 101). The noose itself was about the size of a hand, which was consistent with the size of loops used to tie racking together. (Tr 1039, 1722, 1760). Plaintiff recorded a video of the noose and reported it to management. (Tr 1447, 1755).

Upon receiving the complaint, HR manager Barnett immediately launched an investigation. She documented the noose reported by plaintiff as well as other "loops" regularly used throughout the warehouse, reviewed

security footage, and interviewed nearly half of the warehouse workforce. (Tr 1757-58, 1760-65). A couple of employees said the twine had been there for six months or longer, while other employees had never seen it. (Tr 1764). Ultimately, OLCC was unable to determine who had placed the twine or whether it was deliberately fashioned into a noose in an effort to intimidate or harass plaintiff. (Tr 1764).

The day the noose was discovered, plaintiff left work and filed for worker's compensation, claiming acute stress. (Exs 119, 194; Tr 1450). On June 29, 2012, while plaintiff was on leave related to his worker's compensation claim, he filed this lawsuit.

**D. OLCC's Termination of Plaintiff's Employment for Workplace Misconduct**

In February 2013, a warehouse employee, Staten, informed OLCC that plaintiff and other employees (one of whom, Arizmendez, was still employed with OLCC) had provided him with prescription opiates at work. (Tr 2346, 2600-03). Staten admitted he had come forward with the information only after learning of plaintiff's lawsuit against OLCC, explaining that it bothered him that plaintiff was "acting" like "a victim." (Tr 2617). Staten claimed plaintiff sold him prescription drugs and loaned him money at a 50-percent interest rate. (Tr 2604-07).

OLCC initiated an investigation into Staten's allegations concerning both plaintiff and Arizmendez. (Tr 1845-46). On March 14, 2013, OLCC duty-stationed plaintiff at home with pay pending the conclusion of the personnel investigation. (Tr 2247; Ex 400). Plaintiff was required to be available to his supervisor and HR staff, and was directed not to come onto any portion of the OLCC campuses or to contact OLCC. (Ex 400).

As a result of the investigation, OLCC terminated plaintiff's employment on August 19, 2013, concluding that plaintiff had sold drugs in the workplace, had loaned money to coworkers and charged high interest on repayment, and had engaged in threatening behavior in the workplace. (Ex 413). The agency also terminated Arizmendez's employment. (Tr 1931).

## **E. Trial and the Jury Verdict**

Plaintiff demanded a jury trial and the action proceeded to trial in December 2013, on his claims of racial discrimination, hostile work environment, retaliation, whistleblowing, and failure to reemploy.

### **1. Plaintiff's Reemployment Claim**

At trial, as relevant to plaintiff's reemployment claim under ORS 659A.046, the evidence showed that plaintiff left work on May 10, 2012, filed a worker's compensation claim, and was out for an extended period of time. (Tr 1416). Although he requested reemployment in November 2012 and

again in January 2013 and February 2013, his certifications stated that he was not yet “medically stationary.” (Tr 1257-58, 1744-46).

Initially, the restrictions OLCC received from plaintiff’s medical provider indicated that he could not work in OLCC’s distribution warehouse. (Tr 1771-72). OLCC human resources manager Barnett therefore looked for other jobs at OLCC that were not located in the warehouse. (Tr 1772). At that time, the agency’s maintenance person needed help, so she “put together the modified job description and started [the] process to get [plaintiff] back to work.” (Tr 1772; Ex 123). Plaintiff rejected the modified job offer, however, claiming it was not suitable. (Tr 1772).

In February 2013, plaintiff again requested reemployment, but plaintiff’s medical provider stated that he was not yet medically stationary and included the restriction that he not “work at OLCC.” (Tr 2246). In March 2013, Staten came forward with allegations of plaintiff’s wrongdoing and, as noted, OLCC initiated a personnel investigation and duty-stationed plaintiff at home pending conclusion of the investigation. (Tr 1827-29, 2247-48, 2251).

At the close of plaintiff’s case, OLCC moved for a directed verdict on plaintiff’s reemployment claim, arguing that plaintiff failed to satisfy his burden to produce evidence that OLCC had “suitable and available” employment at which to reemploy plaintiff. The trial court agreed. It concluded that the availability and suitability of employment was an element of plaintiff’s

statutory claim and that plaintiff bore the burden of production on that element. (Tr 2088-89 (SER 49-50)). Because plaintiff produced no evidence that there was suitable employment available during the applicable time period, the trial court granted OLCC a directed verdict on plaintiff's reemployment claim. (*Id.*).

## **2. The Jury's Verdict On Plaintiff's Remaining Claims**

The remaining claims were submitted to the jury after OLCC presented its case, and the jury returned a verdict against plaintiff on his racial discrimination, hostile-work environment, and retaliation claims. On plaintiff's whistleblowing claim, the jury found that OLCC "took adverse enforcement action against plaintiff because he in good faith reported information that he believed was a violation of a law, rule or regulation." (eTCF 1412-13 (SER 11)). But the jury awarded plaintiff no economic or noneconomic damages. (*Id.*).

## **F. Post-Verdict Proceedings**

Immediately after the jury verdict, plaintiff asked the court for "reinstatement" as an equitable remedy. (Tr 3236). The court denied that request. (*Id.*).

Two weeks after the jury verdict, plaintiff filed a written motion for "compensatory and equitable relief," asking the court to grant him lost wages, equitable relief in the form of "front pay," and to "enjoin OLCC from engaging in further illegal practices and take appropriate steps to ensure such conduct

does not occur again, including any post-termination retaliation against plaintiff.” (eTCF 1416-20 (SER 12-16)).

The court denied plaintiff’s post-verdict motion and entered judgment. (eTCF 1497, 1509-12 (SER 33-37)). Plaintiff appealed to the Court of Appeals, asserting 14 assignments of error. The Court of Appeals affirmed the judgment in an opinion that did not address the issues that are before this court on review. *Summerfield v. OLCC*, 294 Or App 415, 431 P3d 424 (2018), *rev allowed*, 364 Or 749 (2019). This court granted review on three questions.

### **SUMMARY OF ARGUMENT**

#### **1. The trial court was not required to grant equitable relief.**

The trial court did not abuse its discretion in declining to grant plaintiff equitable relief. ORS chapter 659A is aimed at eradicating discrimination and other unlawful employment practices in the workplace, and making injured plaintiffs whole for injuries suffered because of unlawful employment practices. Although the legislature gave the trial court broad discretion to grant equitable relief in unlawful employment practice cases, the equitable relief must be “appropriate.” In cases involving violations of the whistleblower protections in ORS chapter 659A, equitable relief is not “appropriate” if it is inconsistent with the purpose of those protections and is not aimed at remedying the employer’s specific unlawful employment practice. Further, although the trial court may have discretion to craft equitable relief that is outside the scope of the relief

requested by the plaintiff, a trial court is not required to do so; thus, a trial court does not abuse its discretion by declining to grant any equitable relief when the plaintiff's requested relief would not serve the purposes of the statute nor remedy the particular harm found in a particular case.

Here, the particular equitable relief requested by plaintiff was not appropriate given the jury's verdict. Plaintiff sought equitable relief aimed at remedying OLCC's termination of plaintiff's employment. But because the jury necessarily found that OLCC did not terminate plaintiff's employment because of his whistleblowing, equitable relief aimed at addressing and remedying plaintiff's termination was not appropriate. Therefore, the trial court did not abuse its discretion by declining to grant the equitable relief requested by plaintiff. Further, the trial court did not abuse its discretion by declining to *sua sponte* fashion equitable relief outside the scope of that requested by plaintiff.

**2. An injured worker has the burden of establishing the availability of suitable employment in a claim under ORS 659A.046.**

In a reemployment claim under ORS 659A.046, the injured worker has the burden of establishing that there was suitable employment available that the worker could have performed. A plaintiff has the burden of persuasion and initial burden of production on all essential elements of his claim, and the applicable substantive law dictates the essential elements of a particular claim.

Here, the text and context of the statute indicates that the legislature intended that all of the factual circumstances in ORS 659A.046(1) are essential elements of a reemployment claim, while exceptions or defenses to the claim are set forth in a different part of the statute, subsection (3).

Therefore, because plaintiff bears the burden of persuasion and the initial burden of production on all essential elements of his claim, under ORS 659A.046, plaintiff had to adduce evidence that, among other things, the employer had a position “available” that was “suitable” given his work restrictions. Because it is undisputed that plaintiff did not produce any evidence that there was a suitable position available at OLCC or any other executive or administrative agency, the trial court correctly granted OLCC a directed verdict on plaintiff’s reemployment claim.

**3. The trial court was not required to give plaintiff’s requested instruction defining adverse employment action.**

The trial court was not required to give plaintiff’s requested jury instruction defining “adverse employment action” because that instruction was an inaccurate statement of the law. The instruction would have informed the jury that an action is adverse if it “might” have deterred a reasonable employee from reporting discrimination. But under this court’s caselaw, the legal standard under ORS 659A.030(1)(f) is whether the action “would” have deterred a reasonable employee. Use of “would” generally indicates a

“probability” standard (more likely than not), and “might” means something less than a probability or even a “possibility” standard.

Even if plaintiff’s proposed instruction accurately stated the law, plaintiff was not prejudiced by the trial court’s failure to give it. There was no real dispute at trial that the actions taken by OLCC would qualify as adverse employment actions. Instead, the central factual dispute was whether OLCC took those adverse actions *because* of plaintiff’s opposition to racial discrimination or harassment. Thus, the failure to define “adverse employment action” as requested by plaintiff did not prejudice plaintiff.

## ARGUMENT

### **A. The trial court did not abuse its discretion in denying equitable relief when OLCC had lawfully terminated plaintiff’s employment.**

The first issue on review is whether, given the jury’s verdict, the trial court was required to exercise its discretion to grant plaintiff some type of post-verdict equitable relief. As noted, the jury’s verdict rejected plaintiff’s racial discrimination and retaliation claims, found that OLCC had taken adverse enforcement action against plaintiff because of whistleblowing, but nevertheless declined to award plaintiff any economic or noneconomic damages.

Immediately after the verdict, the trial court rejected plaintiff’s request for reinstatement, and subsequently rejected plaintiff’s post-verdict motion for other specified equitable relief.

The trial court did not abuse its discretion in denying equitable relief here. ORS chapter 659A requires that any equitable relief be “appropriate,” which means that it must be designed to eradicate or remedy a harm caused by the particular unlawful employment practice in that case. The equitable relief requested by plaintiff was specifically aimed at remedying OLCC’s termination of his employment. But, although the verdict form did not ask the jury to make specific findings about *which* OLCC’s actions violated the whistleblower statutes, as explained below, at a minimum, the jury found that OLCC’s *termination* of plaintiff’s employment *was not* because of his whistleblowing.<sup>1</sup>

Because the equitable relief requested by plaintiff was intended to remedy his employment termination, and because the jury necessarily found that OLCC’s termination of plaintiff’s employment *was not* because of his

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<sup>1</sup> In *Evergreen West Business Center, LLC v. Emmert*, 354 Or 790, 803 n 3, 323 P3d 250 (2014), this court declined to decide whether, “in making a finding of fact in an equitable claim, a trial court must defer to a jury’s previous finding of fact on the same issue in a legal claim in the same action.” The court should not decide that issue in this case either. The parties proceeded below on the assumption that any factual findings by the jury on plaintiff’s claims would be binding on the trial court when the court decided any equitable issues reserved for the court. Thus, neither party asked the trial court to make factual findings separate from the jury’s findings. And, both plaintiff and amicus curiae argue that the trial court was bound by the jury’s factual findings. (Pet Br 12-16; Amicus Br 11-13). Given how the parties proceeded below, for purposes of this appeal, the trial court was bound by the jury’s factual findings and this court need not decide the legal issue it declined to decide in *Evergreen*.

whistleblowing but due to his workplace misconduct, his requested equitable relief was not “appropriate.”

**1. ORS 659A.885 authorizes a trial court to grant “appropriate” equitable relief to remedy unlawful employment practices.**

In general, ORS chapter 659A is concerned with the enforcement of civil rights and unlawful employment practices. *Vaughn v. Pacific Northwest Bell Telephone*, 289 Or 73, 82, 611 P2d 281 (1980). Accordingly, the statutory scheme prohibits unlawful discrimination in the workplace based on race, color, religion, sex, sexual orientation, national origin, marital status, age, disability or familial status. ORS 659A.003. In addition, employers are prohibited from discriminating or retaliating against a person because they have opposed any unlawful employment practice or filed a complaint or participated in any proceeding challenging unlawful employment practices. ORS 659A.030(1)(f). Similarly, ORS chapter 659A provides protections against discrimination or retaliation for “whistleblowing”—*i.e.*, reporting information that the person in good faith believes is evidence of a violation of a state or federal law, rule, or regulation. ORS 659A.199; ORS 659A.203. And finally, employers may not discriminate or retaliate against an employee because that employee, in good faith, brought a civil proceeding against the employer. ORS 659A.230(1).

Like Title VII of the Civil Rights Act, ORS chapter 659A serves dual purposes: (1) to eradicate discrimination and other unlawful employment

practices in the workplace, and (2) to make injured plaintiffs whole for injuries suffered because of unlawful employment practices. *See* ORS 659A.003; *Vaughn*, 289 Or at 82 (noting that ORS chapter 659A is similar to the statutory scheme in Title VII). To facilitate those purposes, the legislature granted a private right of action to challenge unlawful employment practices.

ORS 659A.885. If an employer is found to have engaged in unlawful employment practices under ORS chapter 659A, the legislature authorized the award of compensatory and punitive damages and gave trial courts broad discretion to grant equitable relief that is necessary to accomplish the goals of ORS chapter 659A. ORS 659A.885(1). In particular, the legislature authorized courts to grant “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.” ORS 659A.885(1).

Even though the legislature gave trial courts broad discretion to grant equitable relief, a court’s exercise of discretion is guided by certain legal principles. Generally, when a trial court exercises discretion, it “acts within certain legal boundaries to choose from several permissible outcomes.”

*Espinoza v. Evergreen Helicopters, Inc.*, 359 Or 63, 116, 376 P3d 960 (2016).

As a prerequisite to exercising its discretion, the court must apply correct legal standards for determining the scope of that discretion. *State v. Sarich*, 352 Or 601, 615, 291 P3d 647 (2012). And its ultimate decision must not be based on

predicate legal conclusions that are erroneous, or predicate factual determinations that lack sufficient evidentiary support. *Espinoza*, 359 Or at 117. Moreover, “even when the correct law is applied and there is sufficient evidentiary support for the underlying factual findings, a trial court abuses its discretion if its decision is clearly against all reason and evidence.” *Id.*

Under ORS chapter 659A, the overarching principle that guides a trial court’s exercise of discretion is that any equitable relief must be “appropriate.” ORS 659A.885(1) (authorizing “any other equitable relief that may be appropriate”). In context, that means that any equitable relief must be consistent with the dual purposes of ORS chapter 659A, aimed at remedying the specific unlawful employment practice found by the factfinder, and consistent with the relief requested by the plaintiff.

**a. Any equitable relief must be consistent with the dual purposes of ORS chapter 659A.**

Any equitable relief granted by a trial court must be consistent with the remedial and preventative purposes of ORS chapter 659A: to eradicate discrimination and other unlawful employment practices in the workplace, and make injured plaintiffs whole for injuries suffered because of those unlawful employment practices. This court has recognized that the legislature intended to generally parallel federal Title VII remedies in ORS chapter 659A. *Holien v. Sears, Roebuck and Co.*, 298 Or 76, 99, 689 P2d 1292 (1984); *see also PSU*

*Association of University Professors v. PSU*, 352 Or 697, 708-14, 291 P3d 658 (2012) (recognizing remedial purposes of ORS chapter 659A). And, federal courts have consistently concluded that relief granted under Title VII is intended to serve those dual purposes. *Albemarle Paper Co. v. Moody*, 422 US 405, 418, 95 S Ct 2362, 45 L Ed 2d 280 (1975).

**b. Equitable relief must be tied to the specific unlawful employment practice in a given case.**

Further, to be consistent with the purposes of ORS chapter 659A, equitable relief must be aimed at remedying the specific unlawful employment practice in a given case. In other words, because equitable relief is intended to prevent unlawful employment practices and make injured plaintiffs whole for those particular practices, equitable relief is appropriate only if it remedies the specific unlawful employment practice in a given case.

In contrast, equitable relief that is intended to remedy a harm that did not occur in a particular case is not “appropriate” as that term is used in ORS 659A.885(1). For example, equitable relief intended to remedy unlawful racial discrimination is not “appropriate” in a case where the factfinder found that the employer refused to hire a person based on their sexual orientation.

**2. The jury found that OLCC did not terminate plaintiff’s employment because of his whistleblowing.**

Because the equitable relief available in a particular case depends on the particular unlawful employment practice found in that case, the scope of

available relief depends on what employer actions the factfinder found were unlawful employment practices in that case. Here, as explained in greater detail below, the jury's factual findings demonstrate that the termination of plaintiff's employment was *not* an action that that jury found unlawful. Accordingly, equitable relief related to the termination was not "appropriate."

Plaintiff alleged that OLCC had violated Oregon's whistleblowing laws because it discriminated and retaliated against him "in the terms and conditions of his employment due to his complaints of racial harassment, discrimination, and retaliation." (eTCF 1390 (SER 6)). In closing arguments, plaintiff told the jury that they had heard evidence about "a lot of adverse employment actions," including "failure to promote," "failure to train," and "other slights in the workplace." (Tr 3180). He claimed that "the most disturbing retaliation that [OLCC had] engaged in" was initiating an investigation into him based on Staten's allegations. (*Id.*). Plaintiff asked the jury to find that, given that plaintiff had filed suit against OLCC, OLCC had used Staten's allegations as an excuse to investigate plaintiff and eventually terminate his employment. (Tr 3181-82).

Plaintiff urged the jury to award him economic damages and compensation for emotional distress. He sought approximately \$28,000 for lost wages between May 11, 2012, and March 14, 2013 (the time he was on worker's compensation leave), and approximately \$10,000 for lost wages

between August 19, 2013, and December 20, 2013 (the time between termination of his employment and trial). (Tr 3201). He also requested emotional distress damages, asking the jury to credit testimony that he had suffered from PTSD, anxiety, and distress “based on his termination, which is what the OLCC did.” (Tr 3200-02).

As relevant to plaintiff’s whistleblower claim, the verdict form asked the jury:

Did defendant take adverse enforcement 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 that question by checking “Yes.” The verdict form then directed the jury to answer “What damage, if any should plaintiff be awarded?” And the form provided space for the jury to fill in an award of economic damages not to exceed \$38,932.80, and noneconomic damages not to exceed \$961,066.20. The jury awarded zero economic and noneconomic damages. (eTCF 1413 (SER 11)).

When the jury’s verdict is examined in light of plaintiff’s whistleblowing allegations, his theory at trial, and his request for economic damages, it is apparent that the jury did not find that OLCC terminated plaintiff’s employment in retaliation for whistleblowing. In other words, the verdict makes it apparent that the jury *did not* find that OLCC terminated plaintiff’s employment because of his whistleblowing.

That conclusion necessarily follows from the jury's decision not to award economic damages to plaintiff. As noted, plaintiff requested economic damages only for the period that he was on workers' compensation leave and for the period after OLCC terminated his employment. If the jury had found that OLCC had terminated plaintiff's employment because of his whistleblowing, it necessarily would have awarded him economic damages, as requested, for the period between his employment termination and trial. Because it did not, it follows that the jury did not find that plaintiff's employment termination was because of his whistleblowing.

**3. None of the relief requested by plaintiff was "appropriate," because all of it related to his lawful employment termination.**

Given the jury's factual findings in this case, the trial court did not abuse its discretion by declining to grant the equitable relief requested by plaintiff. The relief requested by plaintiff—future lost wages and injunctive relief aimed at preventing OLCC from giving negative job references to plaintiff in the future—was intended to remedy plaintiff's employment termination. But because the jury found that OLCC did not unlawfully terminate plaintiff's employment, equitable relief intended for that purpose was not appropriate.

**a. Front pay was not appropriate because OLCC did not unlawfully terminate plaintiff's employment.**

Generally, front pay is a short-hand term for future lost pay and benefits, and is intended to restore a "terminated employee to the economic position that

the employee would have enjoyed, were it not for the employer's unlawful conduct." *Tadsen v. Praegitzer Industries, Inc.*, 324 Or 465, 467 n 5, 470, 928 P2d 980 (1996).

Because the purpose of front pay is to make a "terminated employee" whole for an employer's unlawful termination, *id.* at 470, it is not appropriate relief when an employee has not been unlawfully terminated. Put another way, awarding future lost wages and benefits when an employee was lawfully terminated would provide relief for an action that the jury necessarily found was not an unlawful employment practice. Accordingly, in this case, the trial court appropriately declined to award front pay.<sup>2</sup>

**b. Plaintiff's requests for injunctive relief were also aimed at remedying an unlawful employment termination.**

Because plaintiff's other requested equitable relief was also aimed at remedying plaintiff's employment termination, the trial court did not abuse its discretion by declining to award that relief.

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<sup>2</sup> Front pay is not an appropriate equitable remedy in this case for two additional reasons. First, this court has characterized front pay as "compensatory damages," not equitable relief. *Tadsen*, 324 Or at 470. Second, an award of front pay requires an evidentiary showing that plaintiff failed to make in this case. *See id.* at 473-74 (a plaintiff satisfies the "threshold requirement" for front pay if there is sufficient evidence from which a reasonable factfinder "could find that the plaintiff would have earned a particular amount of income in the future, were it not for the defendant's wrongful conduct").

In plaintiff's post-verdict motion for equitable relief, plaintiff argued that in addition to front pay, the court should grant injunctive relief enjoining OLCC from committing further unlawful employment practices. (eTCF 1416-20 (SER 12-16)). In particular, plaintiff asserted that, since plaintiff had filed suit against OLCC, OLCC had engaged in retaliatory conduct and "will likely continue to do so, unless and until ordered to cease and desist such behavior" by the court. (eTCF 1419 (SER 15)).

When OLCC responded that plaintiff's request for injunctive relief was moot given that plaintiff no longer worked at OLCC, plaintiff countered by asserting that his request was not moot because he "is currently applying for other jobs and given the level of animosity directed towards plaintiff, it is clear that the OLCC will not cease its relentless campaign to disparage plaintiff, including to potential employers." (eTCF 1473). In particular, plaintiff argued that the danger that OLCC will "offer potential employers negative references for plaintiff" is "probable or threatened" and suggested that the court could order OLCC not to give "negative job references" when "prospective employers call." (*Id.*). He also suggested that the court could order OLCC "not to interfere with plaintiff's potential future employment with the State." (eTCF 1474; Tr 3245 (SER 21)). Finally, he suggested to the court that it could order "mandatory training for OLCC employees about whistleblower retaliation." (eTCF 1474).

Plaintiff's requested injunctive relief was not appropriate under ORS 659A.885 because—like front pay—that relief was aimed at remedying OLCC's termination of plaintiff's employment. That is, plaintiff's request to enjoin OLCC from giving him negative job references, or otherwise “interfere” with his future potential employment with the state, assumes that OLCC unlawfully terminated his employment. But because the jury found that OLCC did not terminate plaintiff's employment because of his whistleblowing, plaintiff was not entitled to injunctive relief that precluded OLCC from disclosing the reasons for plaintiff's lawful employment termination.

In addition, the court did not abuse its discretion by declining plaintiff's general suggestion that the court order nonspecific “mandatory training.” Because the verdict form did not ask the jury to specify what action OLCC took that was retaliatory, the trial court had no way to know who specifically might need training and what that training needed to address. In other words, the jury's verdict did not give the trial court adequate information to order appropriately tailored injunctive relief and plaintiff did not offer any assistance to the court on that matter other than to suggest that the court could order some form of training. In that circumstance, the trial court is not required to exercise its discretion to order such nonspecific relief.

**c. The trial court was not required *sua sponte* to grant equitable relief outside the scope of relief requested by plaintiff.**

In his brief, plaintiff asks this court to conclude that, if a jury finds an unlawful employment practice but does not award monetary damages, the trial court *must* nevertheless grant some form of equitable relief. But in making that argument, plaintiff never identifies the equitable relief that the trial court was required to grant him in this case. Instead, he only argues that, as a general matter, trial courts have broad discretion in crafting equitable relief. (Pet Br 17-18).

Plaintiff is essentially arguing that, if an employer is found to have engaged in an unlawful employment practice and no compensatory damages are awarded, the trial court must craft some form of equitable relief even where the plaintiff failed to request *any appropriate* equitable relief. In other words, plaintiff asserts that if the trial court fails to *sua sponte* order some form of appropriate equitable relief in those circumstances, it abuses its discretion.

Although a trial court has broad discretion to grant equitable relief, which might allow it to order appropriate equitable relief that was not requested by a plaintiff, plaintiff's proposed rule of law takes that one step too far. A plaintiff bears the responsibility to identify for the trial court the appropriate relief to which he or she is entitled. OLCC is unaware of any principle of law that would require a trial court to exercise its discretion to craft equitable relief

beyond that identified by the plaintiff when the a plaintiff fails to request appropriate equitable relief. That conclusion rings particularly true in this case because, given the lack of specificity in the verdict form, it is difficult to know with certainty exactly what the jury found in this case. So, in this case, without the help of plaintiff, the trial court would have had to attempt to decipher the jury's verdict and then craft some form of equitable relief to address a violation of the whistleblower laws. The trial court's decision not to do so in this case is not an abuse of discretion.

**B. The injured worker bears the burden of establishing the availability of suitable employment for a reemployment claim under ORS 659A.046.**

When an injured worker demands reemployment, ORS 659A.046 generally imposes a duty on employers to reemploy that worker at “employment which is available and suitable.”<sup>3</sup> A violation of that duty is an unlawful employment practice. ORS 659A.046(6).

The trial court correctly granted OLCC's motion for directed verdict on plaintiff's reemployment claim. Plaintiff offered no evidence that, at the time

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<sup>3</sup> ORS 659A.046(1) provides:

A worker who has sustained a compensable injury and is disabled from performing the duties of the worker's former regular employment shall, upon demand, be reemployed by the worker's employer at employment which is available and suitable.

he requested reemployment, there was any employment that would have been both “available” and “suitable” for him. Because the availability of suitable employment is an essential element of a claim under ORS 659A.046, plaintiff’s failure to introduce any evidence on that element was fatal to his reemployment claim.

**1. The availability and suitability of employment is an essential element of a claim for reemployment under ORS 659A.046.**

Because a plaintiff has the burden of persuasion and the initial burden of production on all essential elements of a cause of action, the answer to the second question on review turns on identifying the essential elements of a claim under ORS 659A.046. *See* OEC 305 (“A party has the burden of persuasion as to each fact the existence or nonexistence of which the law declares essential to the claim for relief or defense the party is asserting.”); OEC 307(2) (“The burden of producing evidence as to a particular issue is initially on the party with the burden of persuasion as to that issue.”); *see also Lindland v. United Business Investments, Inc.*, 298 Or 318, 322-23, 693 P2d 20 (1984) (jury instruction assigning “burden of proof” of an essential element of the plaintiffs’ claim to the defendant was incorrect).

The essential elements of a statutory claim are those facts and circumstances that are essential to that claim. *See Seipp v. Howells*, 146 Or 637, 639, 31 P2d 188 (1934) (explaining that, to establish liability, the plaintiff

must prove the essential elements of a claim). The substantive law determines the essential elements of a particular claim. *See* Legislative Commentary to OEC 305, *reprinted in* Laird C. Kirkpatrick, *Oregon Evidence*, § 305.02, 107 (6th ed 2013) (“The elements of a prima facie case or defense are determined by substantive law, not by the law of evidence.”); *Lindland*, 298 Or at 322-23 (citing Legislative Commentary to OEC 305 with approval); *see also State v. Wimber*, 315 Or 103, 110, 843 P2d 424 (1992) (examining several statutes defining sexual abuse crimes to determine whether “time” was an essential element of those crimes). Thus, when the legislature has created a claim by statute, the essential elements of that claim are those facts and circumstances that the legislature intended to be essential to that claim. Therefore, to determine the essential elements of a statutory claim, this court must construe the statute that created the claim.

**a. The legislature included the essential elements of a reemployment claim in ORS 659A.046(1).**

In this case, the legislature intended that all the facts and circumstances identified in ORS 659A.046(1) be essential elements of a reemployment claim, including the availability of suitable employment. That is so because the structure of ORS 659A.046 demonstrates that the legislature intended to include all of the essential elements of a reemployment claim in the “enacting clause” of the statute—*i.e.*, ORS 659A.046(1)—and intended to separately designate

exceptions to an employer's reemployment duty in ORS 659A.046(3).

Therefore, in this case, plaintiff had to establish the availability of suitable employment as an element of his reemployment claim and his failure to introduce evidence of that element was fatal to his claim.

To discern the intent of the legislature, this court must consider the text and context of ORS 659A.046, any relevant legislative history, and rules of statutory construction that "bear directly on how to read the text." *State v. Vasquez-Rubio*, 323 Or 275, 277-78, 917 P2d 494 (1996); *see also State v. Gaines*, 346 Or 160, 170-72, 206 P3d 1042 (2009). Here, the text, context, and structure of ORS 659A.046 demonstrates that the legislature intended to separately identify the essential elements of a reemployment claim and potential defenses to that claim in distinct sections of the statute.

The structure of the statute reveals important clues about the legislature's intent. In subsection (1), the legislature generally created a duty for employers to reemploy injured workers that demand reemployment but are not capable of performing the duties of the worker's former regular employment:

A worker who has sustained a compensable injury and is disabled from performing the duties of the worker's former regular employment shall, upon demand, be reemployed by the worker's employer at employment which is available and suitable.

ORS 659A.046(1). In establishing that duty, the legislature defined the circumstances in which that duty exists. The injured worker must have

sustained a compensable injury, be disabled from performing the duties of his former regular employment, demand reemployment, and there must be employment that is available and suitable given the injured worker's restrictions. Subsection (1) is what is often referred to as the "enacting clause" of a statute because it creates the statutory duty. *See Meyers v. Pacific States Lumber Co.*, 122 Or 315, 320-21, 259 P 203 (1927) (distinguishing between enacting clause and "provisos" in statute). In the absence of the circumstances designated in that subsection, an employer's duty to reemploy an injured worker never accrues.

**b. The legislature included exceptions or defenses to a reemployment claim in ORS 659A.046(3).**

In subsection (3), the legislature used words of "exception" to set out a number of circumstances that excuse the employer's reemployment duty established in subsection (1):

Notwithstanding subsection (1) of this section, the right to reemployment under this section terminates when whichever of the following events first occurs:

(a) The worker cannot return to reemployment at any position with the employer either by determination of the attending physician or a nurse practitioner authorized to provide compensable medical services under ORS 656.245 or upon appeal of that determination, by determination of a medical arbiter or panel of medical arbiters pursuant to ORS chapter 656.

(b) The worker is eligible and participates in vocational assistance under ORS 656.340.

(c) The worker accepts suitable employment with another employer after becoming medically stationary.

(d) The worker refuses a bona fide offer from the employer of light duty or modified employment that is suitable prior to becoming medically stationary.

(e) Seven days elapse from the date that the worker is notified by the insurer or self-insured employer by certified mail that the worker's attending physician or a nurse practitioner authorized to provide compensable medical services under ORS 656.245 has released the worker for reemployment unless the worker requests reemployment within that time period.

(f) Three years elapse from the date of injury.

ORS 659A.046(3). In other words, "notwithstanding" that all of the circumstances designated in subsection (1) exist, if any of the circumstances identified in subsection (3) occur, an employer's duty to reemploy the injured worker "terminates."

That structure shows that the legislature intended that the circumstances listed in subsection (1) are essential elements of a reemployment claim under ORS 659A.046 because, in the absence of any of those facts, an employer's duty never accrues and an employer's failure to reemploy an injured worker does not violate the statute. So when a plaintiff asserts a claim under ORS 659A.885(1) that an employer committed an unlawful employment practice by violating ORS 659A.046, the plaintiff has to prove in the first place that the employer's statutory duty accrued. To do so, the plaintiff must prove

all of the circumstances in subsection (1), including the fact that there was an available and suitable position.

In addition, by separately setting out circumstances where an employer's reemployment duty terminates, the legislature demonstrated that it knew how to create exceptions or defenses to a claim that an employer violated its reemployment duty under ORS 659A.046. If the legislature had intended the nonexistence of "available and suitable" employment to be an exception or defense to a reemployment claim, the legislature would have included that circumstance in subsection (3), or, at the very least, it would have used words of limitation to show that that circumstance was not essential to a claim under ORS 659A.046.<sup>4</sup> *See Severy v. Board of Parole*, 318 Or 172, 178, 864 P2d 368 (1993) (noting that the function of a "notwithstanding" clause is to operate as "an exception to the provisions of the law referenced in the clause").

That understanding of ORS 659A.046 is consistent with how this court has construed criminal statutes to determine the essential elements of a crime.

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<sup>4</sup> That conclusion is also consistent with the general principle that, where a statute explicitly establishes a private right of action for a statutory violation, the essential elements of that statutory claim are usually found in the statutory provision that defines the statutory duty. *See* Edward W. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 Stan L Rev 5, 7 (1959) (explaining that, "in causes of action based on statute, if an exception appears in the enacting clause, *i.e.*, the clause creating the right of action, then the party relying on the statute must show that the case is not within the exception).

When construing a criminal statute, this court uses the “negative exceptions” rule, which provides that, when a statutory provision is plainly set out as an exception that stands apart from the description of the elements of an offense, the state (as the prosecuting party) is not required to negate the exception; rather, the exception constitutes an affirmative defense, which the defendant must establish to prevail. *Vasquez-Rubio*, 323 Or at 278-79.

For example, in *Vasquez-Rubio*, this court examined ORS 166.272 to determine the essential elements of the crime of “unlawful possession of a machine gun.” *Id.* at 277. The statute provided that “a person commits the crime of unlawful possession of a machine gun \* \* \* if the person knowingly possesses any machine gun \* \* \* not registered as required under federal law.” *Id.* at 278. Applying the negative exceptions rule, this court concluded that the state had to prove the machine gun was not registered under federal law because it was an essential element of the offense. *Id.* at 282. This court noted that the phrase “not registered as required under federal law” immediately followed another element of the crime, and that, “[s]ignificantly, it is not set apart from the rest of the definition of the offense by the use of commas and words of limitation.” *Id.* at 280. This court further explained that the legislature can provide for defenses and affirmative defenses by using words of limitation, and that, when the legislature enacts a criminal statute, it knows how to create a defense or affirmative defense. *Id.* at 281. Because the intent to create a

defense was not demonstrated by the text of ORS 166.272, this court concluded that the state had to prove the machine gun was not registered as required under federal law as an element of the offense. *Id.*

The rationale underlying how this court determines the essential elements of a criminal statute should apply with equal force when interpreting ORS 659A.046 because in both instances, this court is determining the legislature's intent by examining the structure of the statute and using rules of statutory construction that "bear directly on how to read the text." *Id.* at 277-78.

**2. Because the availability and suitability of employment is an essential element of the claim, the plaintiff bears the burden of proof on it.**

Because ORS 659A.046 establishes that the availability and suitability of employment is an essential element of a plaintiff's reemployment claim under ORS 659A.046, the plaintiff has the initial burden of production on that element, as well as the burden of persuasion.<sup>5</sup> A "party has the burden of persuasion as to each fact the existence or nonexistence of which the law declares essential to the claim for relief or defense the party is asserting." OEC

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<sup>5</sup> Although not binding on this court, the United States District Court for the District of Oregon has interpreted ORS 659A.046 to place the burden of production on the plaintiff as to the availability and suitability of employment. *See Davis v. Tri-County Metropolitan Transp. Dist. Of Oregon*, 45 F Supp 3d 1222, 1243 (D Or 2014).

305. Further, the burden of producing evidence as to a particular issue is “initially on the party with the burden of persuasion as to that issue.” OEC 307(2). Therefore, because the availability of suitable employment is essential to a reemployment claim, plaintiff bears the burden of persuasion on that fact, as well as the initial burden of production.

Plaintiff’s contrary argument finds no support in BOLI’s administrative regulations. (Pet Br 18). The administrative rules he points to in OAR chapter 839, division 6, do not purport to place the burden on an employer to prove the lack of available and suitable employment. *See* OAR 839-006-0135(6) (recognizing that a suitable position may not be available at the time an injured worker demands reemployment, and directing workers to follow the employer’s reporting policy until offered an available, suitable position). Plaintiff mistakes an employer’s obligation to identify suitable work in response to an injured worker’s demand with *his* obligation at trial to prove his statutory claim under ORS 659A.046. The two are not connected. The legislature chose to designate the availability and suitability of employment as an essential element of a plaintiff’s claim under ORS 659A.046(1), so a plaintiff has the burden of production and persuasion on that element. And in any event, administrative regulations cannot override the legislature’s choice of the essential elements of a statutory claim under ORS 659A.046.

Nor is plaintiff correct that the employer should bear the burden to show the nonexistence of available and suitable employment because the “evidence of the availability of suitable jobs \* \* \* is uniquely within the knowledge and control of the defendant employer.” (Pet Br 19). Although OLCC does not concede that the availability of suitable employment is “uniquely within the knowledge and control of the defendant employer,” even if it is, commentators have cautioned against overemphasizing consideration of whether facts are within the peculiar knowledge of a party when allocating burdens of proof because, “[v]ery often one must plead and prove matters as to which his adversary has superior access to the proof. Nearly all required allegations of the plaintiff in actions for tort or breach of contract relating to the defendant’s acts or omissions describe matters peculiarly in the defendant’s knowledge.” 2 *McCormick on Evidence*, § 337 (7th ed 2016). Moreover, the very purpose of pretrial discovery is to obtain information that might not otherwise be available to a litigant, so it simply does not follow that, because one party possesses information, the other party is relieved from proving a statutory element related to that information.

Regardless, the legislature made the policy choice to allocate the burdens of production and persuasion for the availability and suitability of employment to the plaintiff, and it is not for this court to alter that choice even if this court would have made a different policy choice.

**3. Because plaintiff produced no evidence that suitable employment was available, the trial court correctly granted OLCC a directed verdict.**

The substantive law establishes that the availability of suitable employment is an essential element of a claim under ORS 659A.046.

Therefore, to survive OLCC's motion for directed verdict on his reemployment claim, plaintiff had to produce a quantum of favorable evidence that would have allowed a reasonable person to find that suitable employment was available. Because it is undisputed that plaintiff did not produce evidence that suitable work was available after he demanded reemployment, the trial court appropriately granted OLCC a directed verdict on that claim.

**C. The trial court did not err by refusing to give plaintiff's requested jury instruction defining "adverse employment action."**

The trial court refused to give plaintiff's requested jury instruction defining the phrase "adverse employment action" as an action that "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Plaintiff's requested instruction was an inaccurate statement of the law, which requires proof that the action would—not might—have dissuaded a reasonable worker. Alternatively, any error in refusing to instruct the jury on the definition of "adverse employment action" did not prejudice plaintiff in the context of this case.

**1. The instruction incorrectly defined “adverse employment action” to include anything that “might” dissuade an employee from engaging in protected activity.**

Oregon law entitles a party to a requested jury instruction if that “instruction clearly states the law and engaged the pleadings and the evidence.” *Hernandez v. Barbo Machinery Co.*, 327 Or 99, 106, 957 P2d 147 (1998). That means that the proposed jury instruction must be “complete and accurate in all respects.” *Estate of Schwarz ex rel. Schwarz v. Philip Morris Inc.*, 348 Or 442, 454, 235 P3d 668 (2010). That standard must be understood in the context of the general purpose of jury instructions, which is to “reduce the relevant law to terms readily grasped by the jury without doing violence to the applicable legal rule.” *Rogers v. Meridian Park Hosp.*, 307 Or 612, 616, 772 P2d 929 (1989). Thus, the touchstone is legal accuracy and clarity; anything that misleads or confuses the jury should be avoided. *Williams v. Portland General Elec. Co.*, 195 Or 597, 610, 247 P2d 494 (1952).

ORS 659A.030(1)(f) makes it an unlawful employment practice:

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.

Notably, the statute does not include the term “adverse employment action.” Nevertheless, the parties agreed that the jury instruction addressing plaintiff’s retaliation claim should include that term. (Tr 3004-3010).

Accordingly, during discussions about jury instructions, the parties agreed to an instruction on the elements of plaintiff's retaliation claim that stated:

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 \* \* \* racial discrimination and/or harassment in the workplace.

(Tr 3148 (SER 64)). But the parties advanced competing instructions defining "adverse employment action" to the court. (Tr 3012-16, 3048-69). Plaintiff asked the trial court to instruct the jury consistent with a model Ninth Circuit jury instruction defining "adverse employment action" under Title VII as follows:

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 3049-50 (SER 51-52)).

Ultimately, the court declined to define the term for the jury, concluding that "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).

Plaintiff's requested instruction is an inaccurate statement of the law because it misstates the legal standard for a retaliation claim under ORS 659A.030(1)(f) by informing the jury that an action is an adverse employment action if there is a possibility it dissuaded a worker from making a charge of discrimination. As explained below, the applicable standard under Oregon law is that an action violates ORS 659A.030(1)(f) if it is more likely than not that the action dissuaded a worker from making a charge of discrimination.

In *PSU Association of University Professors*, this court interpreted ORS 659A.030(1)(f) to determine "what standards apply under that provision." 352 Or at 708. After examining the text and context of ORS 659A.030(1)(f), this court ultimately concluded: "To achieve the remedial purpose of ORS chapter 659A, [ORS 659A.030(1)(f)] accordingly imposes a standard that restricts an employer from engaging in retaliatory activity that reasonably *would* impede or deter employees from pursuing their rights under that chapter." *Id.* at 713 (emphasis added). The court then applied that standard to the facts of the case, concluding that the employer's action in that case violated ORS 659A.030(1)(f) because it "reasonably would impede or deter an employee from pursuing his or her statutory rights." *Id.* at 722-23.

Here, the instruction proposed by plaintiff was legally inaccurate because it would have informed the jury that an adverse employment action is an action that *might* have dissuaded a reasonable worker from making or supporting a charge of discrimination, while ORS 659A.030(1)(f) establishes that a retaliatory action is one that reasonably *would* impede or deter employees from pursuing their rights under ORS chapter 659A.

Whether something “might” happen is fundamentally different than whether something “would” happen. The former indicates that there is a possibility that something will happen, and the latter indicates that there is a probability that something will happen. *See Shoup v. Wal-Mart Stores, Inc.*, 335 Or 164, 172-73, 61 P3d 928 (2003) (explaining that, under ORS 19.415(2), an “error must cause something more than the ‘possibility’ of a different result” and is “not merely one that ‘might’ have changed the outcome of the case”); *Green v. Franke*, 357 Or 301, 322-23, 350 P3d 188 (2015) (explaining that, in context of inadequate assistance of counsel claim in post-conviction relief, whether inadequate assistance *would* have tended to affect a jury’s verdict implicates a “probability standard,” while whether inadequate assistance “could have tended to affect” the outcome demands more than a mere possibility, but less than probability); *see also Montgomery Ward v. Bureau of Labor*, 280 Or 163, 168-69, 570 P2d 76 (1977) (noting that the probability standard requires proof that it is more likely than not that a particular thing will happen).

Given that “might” and “would” suggest different legal standards, plaintiff’s proposed instruction would have misled the jury about how they were to apply the evidence to the legal standard established in ORS 659A.030(1)(f). In short, plaintiff’s instruction told the jury that, if it concluded that an action by OLCC possibly dissuaded a reasonable worker from pursuing his rights under ORS chapter 659A, OLCC had taken an adverse employment action. That is not the standard established by this court under ORS 659A.030(1)(f); therefore, plaintiff’s proposed instruction was inaccurate and he was not entitled to it.

**2. Even if plaintiff’s proposed instruction accurately stated the law, the failure to give it did not prejudice plaintiff.**

Alternatively, because any error did not prejudice plaintiff, this court should affirm even if plaintiff’s proposed jury instruction correctly stated the law. “An Oregon appellate court ‘must adhere to the limitation of ORS 19.415(2) and reverse or modify a judgment only if it can [determine] *from the record* that the error ‘substantially affect[ed] the rights of a party.’” *Montara Owners Ass’n v. La Noue Dev., LLC*, 357 Or 333, 352-53, 353 P3d 563 (2015), (quoting *Shoup*, 335 Or at 174) (emphasis in *Montara Owners Ass’n*); *Purdy v. Deere and Company*, 355 Or 204, 236, 324 P3d 455 (2014) (Balmer, C.J., concurring) (“[W]e do not look at trial court errors in the abstract—rather, we examine those errors in the context of the trial record as a whole, including \* \* \* the evidence admitted and excluded[.]”). Further,

ORS 19.415(2) protects a trial court judgement from reversal or modification “except for” error substantially affecting a party’s rights, “indicating that reversal of judgment is the exception, not the rule.” *Shoup*, 335 Or at 173.

Plaintiff was not prejudiced because the record does not demonstrate that the lack of an instruction defining “adverse employment action” substantially affected his rights. That is so because the dispute at trial was not whether the actions taken by OLCC were “adverse employment actions.” That is, OLCC did not dispute that plaintiff was not promoted, or that it investigated plaintiff and eventually terminated his employment. (Tr 3207-08). And there is no question that, under a common understanding of the meaning of “adverse employment action,” the jury would have considered those actions materially adverse to plaintiff.

Rather, the central dispute at trial was whether OLCC took those adverse actions *because* plaintiff opposed or reported “racial discrimination and/or harassment in the workplace.” (Tr 3148, 3208-09). OLCC defended plaintiff’s retaliation claim on the theory that it took the actions it took for legitimate, nondiscriminatory reasons—not that any action it took against plaintiff was not materially adverse. For example, in closing, OLCC argued that evidence showed that plaintiff’s managers and OLCC’s human resources employees followed up on all of plaintiff’s complaints and took appropriate action when it was warranted; the record lacked evidence that job assignments were “race

based”; and the evidence showed that OLCC terminated plaintiff’s employment because of his conduct, not because he complained about racial discrimination. (Tr 3209-11).

Thus, the record does not establish that the failure to define “adverse employment action” for the jury produced a “material influence” or had “a detrimental influence on” plaintiff’s rights. *Shoup*, 335 Or at 173 (under ORS 19.415(2), an “error must cause something more than the ‘possibility’ of a different result” and is “not merely one that ‘might’ have changed the outcome of the case”). Because plaintiff has not met his burden under ORS 19.415(2), this court should conclude that any instructional error did not substantially affect the rights of plaintiff.

**3. Whether the jury instruction actually given by the trial court was erroneous is not properly before this court on review, and even if it is, the instruction given is not reversible error.**

Oregon law recognizes “two different types of error respecting jury instructions: (1) error in the failure to give a proposed jury instruction, and (2) error in the jury instructions that actually were given.” *Williams v. Philip Morris Inc.*, 344 Or 45, 55-56, 176 P3d 1255 (2008). Plaintiff, in his brief, appears to argue that the trial court erred in both respects. But, to the extent he argues that the instruction that the court actually gave was error that argument is not properly before this court on review. (Pet Br 34-35).

**a. Plaintiff failed to challenge the instructions actually given in the Court of Appeals.**

This court's review is limited to "all questions properly before the Court of Appeals that the petition or the response claims were erroneously decided by that court." ORAP 9.20(2). Accordingly, this court does not consider issues that were not raised in the Court of Appeals. *Fountaincourt Homeowners' Association v. Fountaincourt Development, LLC*, 360 Or 341, 352, 380 P3d 916 (2016).

In the Court of Appeals, plaintiff assigned error to the trial court's decision not to give an instruction defining "adverse employment action." (COA App Br 29). But the only argument that he developed to the Court of Appeals was that the trial court erred by refusing to give plaintiff's requested jury instruction because it was a correct statement of the law and "there was evidence to support it." (COA App Br 29-35). In his argument, plaintiff set out the text of the jury instruction he requested and explained why, in his view, that instruction was consistent with the legal standard for establishing an unlawful retaliation claim.

At one point in plaintiff's Court of Appeals brief, plaintiff suggested that the instruction actually given by the trial court was erroneous because it failed to instruct the jury "what adverse employment met." (COA App Br 36). But plaintiff made that assertion entirely within the context of arguing that plaintiff

had been prejudiced by the trial court's refusal to give plaintiff's proposed jury instruction. (COA App Br 35-36). In other words, plaintiff never presented a standalone argument that the jury instruction actually given was erroneous because, having used the term "adverse employment action" to describe an element of a retaliation claim, the court had neglected to define that term for the jury. Accordingly, he did not raise any issue in the Court of Appeals that the trial court erred simply because the instructions it actually gave were erroneous because they did not define "adverse employment action."

In sum, the issue developed by plaintiff in the Court of Appeals was whether the trial court erred by refusing to give plaintiff's requested jury instruction, and whether that refusal prejudiced plaintiff. Thus, that is the only issue properly before this court on review.

**b. The trial court correctly concluded that the jury would understand the commonly understood meaning of "adverse employment action" without a specific definition.**

The trial court's decision to not define "adverse employment action" for the jury is not error. Here, the trial court concluded that the jury would understand the meaning of "adverse employment action" based on the common understanding of those words. That is, given that the standard in ORS 659A.030(1)(f) prohibits "retaliatory activity that reasonably would impede or deter employees from pursuing their rights under" ORS chapter

659A, a jury would have understood the common understanding of “adverse employment action” to encompass that standard. As such, the court did not err when it concluded that a specific jury instruction defining that term was not necessary for the jury because the instructions given adequately “reduce[d] the relevant law to terms readily grasped by the jury without doing violence to the applicable legal rule.” *Rogers*, 307 Or at 616. So, although the trial court could have defined “adverse employment action” consistent with the standard under ORS 659A.030(1)(f), it was not required to do so.

- c. **Any error by the trial court in failing to instruct the jury about the definition of “adverse employment action” did not prejudice plaintiff.**

Finally, for the reason explained above, even if the failure to define “adverse employment action” for the jury was error, the jury instruction actually given did not prejudice plaintiff because the central disputed factual issue was whether OLCC took adverse actions against plaintiff *because* of his reports of racial discrimination and harassment. OLCC did not dispute that the actions that plaintiff pointed to as retaliatory would have impeded or deterred a reasonable employee from pursuing his or her rights under ORS 659A.030(1)(f). Thus, the failure to define “adverse employment action” for the jury did not substantially affect plaintiff’s rights.

**CONCLUSION**

For the reasons stated above, this court should affirm the trial court's judgment.

Respectfully submitted,

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## **NOTICE OF FILING AND PROOF OF SERVICE**

I certify that on August 8, 2019, I directed the original Brief on the Merits of Respondent on Review, Oregon Liquor Control Commission, to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Michael E. Rose, attorney for petitioner on review, and Caitlin Van Tassel Mitchell, attorney or amicus curiae, Oregon Trial Lawyers Association, by using the electronic filing system.

### **CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)**

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 10,887 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

/s/ Colm Moore

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