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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

LANORA VASQUEZ,

Plaintiff,

v.

BLUBIRD WORLD LLC, d.b.a. MINDRITE
DISPENSARY,

Defendant.

Case No. 18CV41572

**PLAINTIFF’S TRIAL
MEMORANDUM**

INTRODUCTION

Plaintiff Lanora Vasquez (“Plaintiff”) brings this employment action against Defendant Blubird World LLC (“Defendant”) alleging violations of the Fair Employment Practices Act, ORS Chapter 659A.

Plaintiff seeks economic damages in the approximate amount of \$32,000 and non-economic damages not to exceed her prayer of \$450,000.

The parties anticipate a 4-day or 5-day trial.

SUMMARY OF FACTS

Defendant owns and operates a marijuana dispensary under the assumed business name of MindRite Dispensary.

In April 2015 MindRite hired Plaintiff to work at the front desk of its dispensary. At the time of hire, Plaintiff told Jaime Conley that she had PTSD and said one of the reasons she applied to work at the dispensary was because she had used marijuana to

1 treat symptoms of her mental health condition.

2 Plaintiff excelled in her work for at least the first 18 months of her employment,
3 and MindRite promoted Plaintiff to the positions of Sales Associate, and then Training
4 Manager/Specialist.

5 In 2017 Plaintiff made several reports of sexual harassment. She first made these
6 reports verbally to her supervisor, Alexa Midcalf. These included, for example, that one
7 of the male employees would get drunk after work and make unwanted and aggressive
8 sexual advances to Plaintiff and other female employees. Plaintiff then gave Ms. Midcalf
9 a draft of a formal sexual harassment complaint, which Ms. Midcalf encouraged
10 Plaintiff to give to the owners, Jaime and John Conley.

11 On August 11, 2017, Plaintiff emailed the sexual harassment complaint to Jaime
12 and John Conley. It alleged various acts of sexual harassment by the male employees of
13 MindRite, including causing sexual content to be on the workplace computer,
14 sexualizing female customers, making comments about the bodies of female customers
15 and coworkers, and trying to get female coworkers to engage in sex whenever a work
16 event included alcohol. Plaintiff also described an event involving another manager,
17 Stephen Davenport, in which he looked down the shirt of a female customer and told
18 Plaintiff that it made him sexually aroused.

19 Over the course of this litigation, discovery revealed six instances in 2016 and
20 2017 of documented discipline of MindRite's male employees for conduct that a
21 reasonable jury could conclude were acts of sexual harassment. A seventh sexual
22 harassment event occurred shortly after Plaintiff's complaint.

23 On September 27, 2017, Plaintiff complained in person to Jaime Conley that
24 sexual harassment at MindRite was ongoing. She told Ms. Conley that she was suffering
25 an exacerbation of her PTSD symptoms as a result of the sexual harassment. Plaintiff
26 also told Ms. Conley that she believed she had been sexually assaulted approximately
27 six months earlier at a work event Plaintiff then requested to not have to work directly

1 with the man she believed sexually assaulted her.

2 On October 3, 2017, MindRite demoted Plaintiff, eliminated some of her job
3 responsibilities, and gave her a written warning for unsatisfactory performance and
4 inappropriate behavior. MindRite attached to the written warning a printout of social
5 media posts in which Plaintiff had said she felt unsafe at work.

6 On October 11, 2017, Plaintiff resigned her employment citing intolerable
7 working conditions.

8 ELEMENTS AND ISSUES OF LAW

9 Plaintiff alleges the following unlawful employment practice claims:

- 10 (1) Sex discrimination arising from a hostile work environment;
- 11 (2) Sex discrimination arising from Defendant's disparate treatment after she
12 complained of sexual harassment;
- 13 (3) Discrimination because of Plaintiff's request for disability accommodation;
- 14 (4) Disability discrimination arising from Defendant's failure to make reasonable
15 accommodations of her disability;
- 16 (5) Disability discrimination because of the symptoms of her disability; and
- 17 (6) Whistleblower retaliation.

18 1. Hostile Work Environment

19 Plaintiff alleges that the terms and conditions of her employment were
20 discriminatory because of a hostile work environment. The prohibition on sex
21 discrimination under ORS 659A.030(1)(b) includes sexual harassment that creates a
22 hostile work environment. *McPhail v. Milwaukie Lumber Co.*, 165 Or App 596, 606, 999
23 P2d 1144 (2000). For sexual harassment to be actionable, "it must be sufficiently severe
24 or pervasive to alter the conditions of the victim's employment and create an abusive
25 working environment." *Bearden v. N.W.E., Inc.*, 298 Or App 698, 704, --- P3d --- (2019)
26 (citing *Harris v. Pameco Corp.*, 170 Or App 164, 177, 12 P3d 524 (2000) (quoting *Mains v. II*
27 *Morrow, Inc.*, 128 Or App 625, 635, 877 P2d 88 (1994)).

1 Oregon courts use a “totality of circumstances” test to determine whether
2 harassing conduct is sufficiently severe and pervasive to create an intimidating, hostile
3 or offensive working environment. *Fred Meyer, Inc. v. BOLI*, 152 Or App 302, 309, 954
4 P2d 804 (1998). Circumstances considered include the frequency of the harassing
5 conduct, its severity, whether it is physically threatening or humiliating, and whether it
6 unreasonably interferes with an employee’s work performance. *See Garcez v. Freightliner*
7 *Corp.*, 188 Or App 397, 408, 72 P3d 78 (2003) (applying the totality of circumstances test
8 to a Title VII hostile work environment claim).¹

9 Oregon courts also use an objective, “reasonable person” standard when making
10 hostile work environment determinations. *Fred Meyer, Inc.*, 152 Or App at 307. The
11 “reasonable person” must be similarly situated to the plaintiff. *Id.* Therefore, when
12 considering Plaintiff’s hostile work environment claim, the jury (and this court) must
13 take into account how Plaintiff’s PTSD and generalized anxiety affected her perception
14 of the alleged sexual harassment events.

15 **a. Conduct Occurring Outside of Work**

16 Defendant will argue that conduct occurring outside of the workplace cannot be
17 used to show severe or pervasive sexual harassment. Numerous courts have flatly
18 rejected that assertion. *See Doe v. Oberweis Dairy*, 456 F3d 704, 715 (7th Cir 2006) (“The
19 sexual act need not be committed in the workplace . . . to have consequences there.”); *see*
20 *also Dowd v. United Steelworkers, Local No. 286*, 253 F3d 1093, 1102 (8th Cir 2001)
21 (“offensive conduct does not necessarily have to transpire at the workplace in order for
22 a juror reasonably to conclude that it created a hostile working environment”);
23 *Temparali v. Rubin*, CIV. A. 96-5382, 1997 WL 361019, at *3 (ED Pa June 20, 1997) (“an
24

25 ¹ Federal court decisions interpreting Title VII claims may guide Oregon courts when
26 they construe a hostile work environment claim under state law, but such federal
27 precedent is not binding on this Court. *PSU Chapter of Am. Ass’n of Univ. Professors v.*
PSU, 352 Or 697, 710–11, 291 P3d 658 (2012) (*en banc*).

1 employee who is forced to work for or in proximity to someone who is harassing her
2 outside the workplace may reasonably perceive the work environment to be hostile”).

3 Acts of sexual harassment occurring off work premises will be shown to have a
4 nexus with the workplace. If the out-of-work conduct has a sufficient nexus to the
5 workplace, it can be considered as evidence of sexual harassment. *Barclay v. Mercy*
6 *Health Servs.-Iowa Corp.*, C 07-4074-MWB, 2009 WL 2462296, at *9 (ND Iowa Aug 12,
7 2009). Plaintiff will present evidence that Defendant repeatedly sanctioned events off
8 work premises by encouraging staff attendance, paying for staff participation, and
9 purchasing alcoholic beverages for staff at the events.

10 ***b. Conduct Not Reported to Defendant***

11 Defendant will also argue that Plaintiff cannot rely on events unreported to
12 Defendant to establish a hostile work environment. This argument is fails for several
13 reasons.

14 First, a supervisor’s knowledge of harassment can be imputed to the employer
15 when the employer has a policy that requires the supervisor to report sexual
16 harassment. *See EEOC v. U.S. Bakery, Inc.*, CV 03-64-HA, 2004 WL 1774214, at *9 (D Or
17 Aug 9, 2004). Defendant’s sexual harassment policy encourages employees to report
18 sexual harassment to any supervisor or manager.

19 Second, Further, an employer is liable for the sexual harassment of a coworker if
20 the employer fails to take adequate remedial measures after the employer knows or
21 *should know* of the harassment. OAR 839-995-0030(6) (emphasis added). Oregon courts
22 have adhered to the standards for employer liability for sexual harassment provided in
23 the OARs. *See Mains v. II Morrow, Inc.*, 128 Or App 625, 877 P.2d 88 (1994); *Fred Meyer,*
24 *Inc.*, 152 Or App at 307 (1998). The employer should have known of the harassment
25 unless it can demonstrate that it exercised reasonable care to prevent and promptly
26 correct any sexually harassing behavior, and that the aggrieved person unreasonably
27 failed to take advantage of any preventive or corrective opportunities provided by the

1 employer or otherwise avoid harm. OAR 839-005-0030(5)(b)(A)(B). If an employer is
2 aware of prior harassment against employees *other* than a plaintiff employee, and the
3 employer fails to take sufficiently appropriate corrective action, then the employer may
4 be liable for the plaintiff's harassment. *Branford v. Washington County*, 3:17-CV-94-SI,
5 2019 WL 1957951, at *10 (D Or May 2, 2019).

6 Defendant may also be liable if it had constructive knowledge of harassment. *See*
7 *Taylor v. Jones*, 653 F2d 1193, 1197-99 (8th Cir 1981) (holding employer liable for racially
8 hostile work environment based on constructive knowledge in a Title VII claim). Where
9 harassment in the workplace is sufficiently pervasive and long continuing, the
10 employer may have constructive knowledge of the harassment and therefore may be
11 liable. *See id.* at 1199.

12 **2. Disparate Treatment**

13 It is an unlawful employment practice for an employer to discriminate "in terms,
14 conditions or privileges of employment" because of an individual's sex. ORS
15 659A.030(1)(b). To prevail on this claim, Plaintiff must establish that the employer took
16 an adverse employment action because of her sex. *See Lansford v. Georgetown Manor, Inc.*,
17 192 Or App 261, 277, 84 P3d 1105 (2004), (discussing Oregon's standard for summary
18 judgment standard in an employment discrimination claim), *opinion adh'd to as modified*
19 *on recons*, 193 Or App 59 (2004), rev den, 337 Or 182 (2004). In proving causation, a
20 plaintiff must show that her protected status was a factor that "made a difference" in the
21 adverse employment decision. *Ossanna v. Nike, Inc.*, 290 Or App 16, 28, 415 P3d 55
22 (2018), rev allowed, 363 Or 390 (2018), and aff'd, 365 Or 196 (2019)

23 Sex discrimination includes an adverse action for making a complaint about
24 sexual harassment. *See Ballinger v. Klamath Pac. Corp.*, 135 Or App 438, 450 n. 9, 898 P2d
25 232 (1995), rev den, 322 Or 360 (1995) ("When a supervisor threatens a female employee
26 with 'messy' repercussions if she does not drop her sexual harassment complaint
27 against him and a male co-worker, that is a clear example of gender-based differential

1 treatment in the workplace”). There are at least four ways in which the evidence creates
2 a jury question as to whether Plaintiff was demoted and disciplined because of her
3 complaints about sexual harassment.

4 First, the temporal proximity between a protected complaint and an adverse
5 action may establish causation. The Oregon Court of Appeals has held that a “gap of
6 one to two months between the claimed protected activity and the
7 subsequent adverse action . . . is sufficient to raise an issue of fact on causation.” *Meyer*
8 *v. State by & through Oregon Lottery*, 292 Or App 647, 683-84, 426 P3d 89 (2018). As
9 explained above, Defendant’s adverse action occurred on October 3, 2017, which was
10 less than a week after Plaintiff’s complaint on September 27, 2017. The adverse action
11 was also less than two months after Plaintiff’s email about Mr. Davenport’s conduct on
12 August 10, 2017.

13 Second, Defendant asserts that it relied on input from Mr. Davenport about
14 Plaintiff’s performance deficiencies. In showing that the protected characteristic caused
15 the discrimination, a plaintiff is not required to show that the person who made the
16 decision had the protected characteristic in mind. *La Manna v. City of Cornelius*, 276 Or
17 App 149, 159-60, 366 P3d 773 (2016). It is sufficient if the decision-making process was
18 influenced by a subordinate who was biased against the plaintiff because of the
19 protected characteristic. *Id.* See also *Ossanna*, 290 Or App at 29 (“a subordinate’s bias can
20 be imputed to an otherwise independent decision-maker”). Mr. Davenport knew that
21 he was disciplined because of Plaintiff’s complaint, and he only documented concerns
22 about her performance after Plaintiff’s complaint. Mr. Davenport’s notes also listed
23 statements from James Starke, who Plaintiff alleges sexually assaulted her.

24 **3. Discrimination Because of Disability Accommodation Request**

25 It is an unlawful employment practice for an employer to discriminate against an
26 employee because they have requested disability accommodation. ORS 659A.109. To
27 prevail on this claim, Plaintiff must show that her request for disability accommodation

1 was a factor that made a difference in Defendant taking adverse action against her. *See*
2 *Ossanna*, 290 Or App at 32 (2019). *See also Nelson v. Unified Grocers, Inc.*, CV 10-531-PK,
3 2011 WL 7029671, at *14 (D Or July 18, 2011), report and recommendation adopted in
4 part, rejected in part, 3:10-CV-00531-PK, 2012 WL 113742 (D Or Jan 12, 2012) (“To
5 prevail on a claim for retaliation under [ORS 659A.109], a plaintiff must establish (1)
6 that he or she invoked one or more rights provided by former O.R.S. 659A.100 to
7 659A.145, and (2) that he or she suffered an adverse employment action motivated in
8 substantial part by the plaintiff’s invocation of such rights.”).

9 Importantly, a claim under ORS 659A.109 does not require the plaintiff to be a
10 qualified individual with a disability. *Herbert v. Altimeter Inc.*, 230 Or App 715, 728, 218
11 P3d 542 (2009). Plaintiff’s request for a safe work environment was a protected act even
12 if she cannot establish a disability or a reasonable accommodation.

13 **4. Failure to Make Reasonable Accommodations of a Disability**

14 In addition to alleging that her request for accommodation was a factor in
15 Defendant’s adverse actions, Plaintiff alleges that Defendant discriminated against her
16 because of her disability in violation of ORS 659A.112. There are two independent
17 theories alleged in her complaint. First, she alleges that Defendant failed to make
18 reasonable accommodations of her disability, which is a form of discrimination under
19 Subsection 112(2)(e).

20 Plaintiff will rely on the perpetuated testimony of her therapist, Roxanne
21 Mossman, LCSW, PhD, to establish that she has a mental impairment in the form of a
22 diagnosis for PTSD.

23 Despite having been told explicitly of Plaintiff’s exacerbated mental health
24 symptoms, Defendant will argue that Plaintiff did not request accommodation.
25 However, when an employee with a mental illness makes a request for accommodation,
26 the employer cannot require an employee to use magic words and should seek to
27 construe requests for “less stressful” working conditions as a request for

1 accommodation. See *Bultemeyer v. Fort Wayne Cmty. Sch.*, 100 F3d 1281, 1285 (7th Cir
2 1996) (“an employer cannot expect an employee to read its mind and know that he or
3 she must specifically say ‘I want a reasonable accommodation,’ particularly when the
4 employee has a mental illness.”). See also *Johnson v. Evangelical Lutheran Good Samaritan*
5 *Society*, 2005 WL 2030834 at *7-. (D Or Aug 23, 2005) (citing *McGary v. City of Portland*,
6 386 F3d 1259, 1266 (9th Cir 2004)).²

7 Given the evidence that Plaintiff did indeed request accommodation, Defendant
8 will argue that Plaintiff was unable to perform the essential functions of her job. Oregon
9 courts have generally rejected any bright line standard for determining the essential
10 functions of a position. See *Evans v. Multnomah County Sheriff’s Office*, 184 Or App 733,
11 742-744, 57 P3d 211 (2002) (a material fact existed when a police officer with an injured
12 hand identified alternate positions he could work that limited the impact of his
13 disability on using firearms even though the ability to use a firearm was an essential
14 function of every possible position).

15 **5. Discrimination Because of the Symptoms of a Disability**

16 Plaintiff’s second theory of disability discrimination arises from her allegation
17 that Defendant discriminated against her because of the symptoms of her PTSD.
18 “[W]ith few exceptions, conduct resulting from a disability is considered to be part of
19 the disability, rather than a separate basis for [an adverse action].” *Dark v. Curry Cty.*,
20 451 F3d 1078, 1084 (9th Cir 2006) (citing *Humphrey v. Mem’l Hosps. Ass’n*, 239 F3d 1128,
21 1139–40 (9th Cir 2001)). Plaintiff will present evidence that Defendant’s reason for
22 demoting and disciplining her included that her attitude had worsened during the time
23 of her exacerbated PTSD symptoms.

24 To prove a claim for discrimination under ORS 659A.112, Plaintiff must show

25 _____
26 ² Unlike caselaw interpreting Title VII, federal caselaw interpreting the ADA is highly
27 persuasive to Oregon courts because ORS 659A.112 must be construed consistent with
the ADA. ORS 659A.139.

1 only that the symptoms of her disability were a factor that made a difference in
2 Defendant's adverse action against her. *See Ossanna*, 365 Or at 214.

3 **6. Whistleblower Retaliation**

4 Under ORS 659A.199, an employer acts unlawfully when it takes an adverse
5 action against an employee "for the reason that the employee has in good faith reported
6 information that the employee believes is evidence of a violation of a state or federal
7 law, rule or regulation." ORS 659A.199.

8 An employee engages in protected activity when she reports in good faith
9 information that the *she believes* is a violation of state or federal law. *Neighorn v. Quest*
10 *Health Care*, 870 F Supp 2d 1069, 1102 (D Or 2012). Thus, the employee need not be
11 objectively correct about the existence of a statutory violation to prove a claim of
12 retaliation. *Neighorn*, 870 F Supp 2d 1069 at 1102 (citing *Krouse v. Ply Gem Pac. Windows*
13 *Corp.*, 803 F.Supp.2d 1220, 1228 (D Or 2011) (citing *Yeager v. Providence Health Sys. Or.*,
14 195 Or App 134, 96 P.3d 862 (2004)).

15 Oregon courts have adopted the "materially adverse" standard of Title VII
16 retaliation claims for Oregon retaliation claims. *See Meyer*, 292 Or App at 678–82; *see also*
17 *PSU Chapter of Am. Ass'n of Univ. Professors*, 352 Or at 711-13. For an employer's action
18 to be materially adverse, that action "must be harmful to the point that [it] could well
19 dissuade a reasonable worker from making or supporting a charge of discrimination."
20 *Meyer*, 292 Or App at 679 (citing *Burlington N. & S. F. R. Co. v. White*, 548 U.S. 53, 126
21 S.Ct. 2405 (2006). Under that standard, an employment action can be adverse even
22 where it does not affect "the employee's compensation, terms, conditions, or privileges
23 of employment." *Id.*

24 The standard for proving causation under ORS 659A.199 is the same as
25 discussed above—i.e., Plaintiff must show that her protected activity was a factor that
26 made a difference in the adverse employment action. *Ossanna*, 365 Or at 214.

27 ///

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I served the foregoing PLAINTIFF’S TRIAL

3 MEMORANDUM on:

4 Joshua DeCristo
5 Kaitlyn Dent
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11 Of Attorneys for Defendant

12 by the following indicated method or methods:

- 13 by **hand delivery** a copy thereof to the attorney/party shown above on the date set forth below.
- 14 by **emailing** a copy thereof to the attorney/party at the email address(es) shown above on the date set forth below.
- 15 by **e-serving** a copy thereof via the court’s electronic filing system to the attorney/party shown above on the date set forth below.

16 DATED this 27th day of September, 2019.

17
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