

**CONFIDENTIAL  
INVESTIGATION REPORT**

**Prepared For:**

Oregon Bureau of Labor & Industries

**Delivered To:**

Sylvia Van Dyke, Senior Assistant Attorney General |  
Labor & Employment | General Counsel Division  
Oregon Department of Justice

**Submitted By:**

Brenda K. Baumgart, Stoel Rives LLP

**Dated: August 16, 2021**

## **I. Introduction**

The State of Oregon, acting by and through its Department of Justice (“DOJ”), and for the benefit of the State of Oregon, Bureau of Labor & Industries (“BOLI” or “Agency”), engaged Stoel Rives LLP to perform services as a Contractor under a Professional Services Contract (the “Contract”). Thereafter, and under the terms of the Contract, Sylvia Van Dyke, on behalf of BOLI, requested that I investigate concerns of race, color, and gender discrimination raised by Carol Johnson, the outgoing Administrator of BOLI’s Civil Rights Division (the “CRD”), with respect to her employment at BOLI. Ms. Johnson filed a charge with the Equal Employment Opportunity Commission (“EEOC”), served a tort claim notice, and ultimately filed a lawsuit against BOLI in April 2021. During the course of the investigation, a second former BOLI CRD employee, Shaina Pomerantz, also cited allegations in her resignation letter of inappropriate treatment based on her race, served a tort claim notice, and ultimately filed a lawsuit against BOLI in June 2021. Because of the related nature of the allegations, Ms. Van Dyke, on behalf of BOLI, requested that I include Ms. Pomerantz’s allegations within the scope of my investigation, as well as report on any broader findings as to whether an anti-Black culture is pervasive at BOLI.

## **II. Executive Summary**

### **A. Carol Johnson’s Allegations**

Ms. Johnson served as the Administrator for the CRD from July 2019, until her resignation, effective August 28, 2020. Ms. Johnson was selected for her position following a nationwide search. While employed at BOLI, Ms. Johnson served at the pleasure of the Labor Commissioner, Val Hoyle (the “Commissioner” or “Commissioner Hoyle”), and her direct supervisor was Deputy Labor Commissioner Duke Shepard (“Deputy Commissioner” or “Deputy Commissioner Shepard”). Not only was Ms. Johnson new to Oregon and new to state government, but she also commenced her role approximately six months into Commissioner Hoyle’s new administration and in the midst of ongoing change management.

As set forth in detail below, Ms. Johnson alleges that from the inception of her employment at BOLI, certain of her subordinates targeted her for disparate treatment and hostility due to her race, color, and gender. Ms. Johnson does not allege any overt or direct race- or gender-based comments or racial slurs. Rather, she alleges that subordinates engaged in microaggressions, *e.g.*, trying to discredit her authority and expertise, resisting programmatic changes, and being insubordinate, due to her status as a Black woman. Ms. Johnson further alleges that BOLI’s upper management, including Commissioner Hoyle and Deputy Commissioner Shepard, gave her no authority to admonish or discipline her staff, further exposing her to discriminatory targeting and harassment. Ms. Johnson maintains she reported concerns of a hostile and discriminatory work environment, including as early as September 2019, to Commissioner Hoyle and Deputy Commissioner Shepard and, on about May 23, 2020, requested “immediate investigation into workplace discrimination.” Ultimately, Ms. Johnson maintains BOLI leadership failed to do anything to address her ongoing concerns. Additionally, on about June 25, 2020, Ms. Johnson alleges she received a package of feces in the mail at her home from an anonymous source who she believes was someone at BOLI.

Ms. Johnson submitted her voluntary resignation notice on July 20, 2020, citing her inability to remain in her role due to the consistent racial animus and racially motivated hostilities from her staff, notwithstanding her reports of such behavior. That conduct, together with the feces incident—which Ms. Johnson perceived to be a racially motivated threat by a BOLI employee—left her greatly concerned for her health and safety while working for BOLI in light of what she described as escalating hostilities and an extremely toxic work environment.

After interviewing 20 witnesses, including Commissioner Hoyle and Deputy Commissioner Shepard (Ms. Johnson declined to be interviewed), and after analyzing all witness statements and relevant documents, I do not find sufficient evidence to substantiate Ms. Johnson’s allegations that she was subjected to discrimination, or a hostile work environment based on her race, color, or gender while she was employed as the CRD Administrator at BOLI. And, though on various occasions Ms. Johnson did share her perception that staff were treating her differently because she is a Black woman, or that their concerns about her were frivolous, the record does not bear out that BOLI leadership engaged in any action that undermined her authority. Conversely, what the record shows is that BOLI leadership was loyal to Ms. Johnson almost to a fault. Finally, while the information received certainly suggests that Ms. Johnson did receive a package of cow feces from a company doing business as “Poop Senders” that markets “the ultimate gag gift” and guarantees anonymity, there was nothing in the record to substantiate any nexus between this incident and any BOLI employee or Ms. Johnson’s employment at BOLI.

Given that these concerns were asserted by one of the few African American female leaders in Oregon state government, and many of the allegations arose against the backdrop of not just a global pandemic, but George Floyd’s murder and all that was transpiring in our city and nation with respect to racial injustice, systemic racism, and the Black Lives Matter movement, I endeavored to apply a culturally competent lens throughout the investigation. I also spoke with the closest comparators to Ms. Johnson to hear their perspectives on what it is like to work at BOLI as a person of color, including as a Black woman. Because this investigation examines microaggressions rather than overtly hostile or discriminatory acts, it also was important to be mindful of and inquire into implicit bias. Though microaggressions can lead to a hostile work environment when sufficiently severe and pervasive, and taking Ms. Johnson at her word because her perception is her reality, on this record I do not find it more likely than not that subordinates’ treatment of Ms. Johnson was motivated—expressly or implicitly—by her race, color, or gender. Rather, the record supports that while there indisputably was pushback from certain CRD staff, it was in response to Ms. Johnson’s nearly immediate and sweeping changes to investigation processes and protocols and the manner in which those changes were instituted. Employees have the right to express workplace concerns and, though I make no finding as to whether those concerns were prudent, the record supports that they were genuine, and I do not find them to be pretext for unlawful bias.

## **B. Shaina Pomerantz’s Allegations**

Ms. Pomerantz served as a Senior Civil Rights Investigator in BOLI’s CRD from April 2020, until her voluntary resignation, effective December 31, 2020. Ms. Johnson hired Ms. Pomerantz along with three other CRD investigators, all of whom are people of color and three of whom, including Ms. Pomerantz, are Black. Though Ms. Pomerantz came to BOLI with

significant work experience, this was her first foray into civil rights work. Ms. Johnson handled the onboarding and training for Ms. Pomerantz and the other new investigators. Under the applicable union contract, new hires are subject to a six-month trial service (*i.e.*, probationary) period. The contract also allows for an extension of this period.

In her resignation letter, Ms. Pomerantz raised a number of concerns with respect to her perceptions of Ms. Johnson's treatment and also some concerns that pertained directly to her employment. She called out a tone of anti-Blackness and disparate treatment toward Black people, which resulted in her loss of confidence in BOLI's willingness to treat her fairly and professionally or to provide her with the necessary resources and support to do her job. Now, Ms. Pomerantz more clearly alleges that she had been subjected to a racially hostile work environment and disparate treatment by her CRD colleagues and managers.

Ms. Pomerantz's primary allegation is that the extension of her trial service period was discriminatory and retaliatory, and the same standard was not applied to white comparators. She also alleges that she and other Black investigators were assigned a disproportionate number of intakes as compared to non-Black investigators. Finally, she alleges that non-Black CRD colleagues "shut down" or told them their questions were inconsistent with CRD practices when she and other Black employees (all of whom were new to the Agency) spoke up in virtual staff meetings, as distinguished from how they treated white colleagues with courtesy and respect. Ms. Pomerantz alleges she reported her concerns during her employment, but her supervisors failed to remedy her situation.

During her brief tenure, Ms. Pomerantz was first directly supervised by Operations Manager T.R. (Black male), and then from about mid-July through her resignation, she was supervised by Operations Manager L.W. (Caucasian female). With the recognition that employees progress at different rates and acknowledging that onboarding in an entirely remote work environment presents additional challenges, T.R. observed Ms. Pomerantz to be progressing at a slower rate than her co-investigators who came on at the same time and, even then, he was concerned she may not make it out of her trial service period. When L.W. took over supervisory duties, she met with Ms. Pomerantz on a regular (typically weekly) basis, providing her direct coaching and feedback as well as tools to help improve her performance. At the six month mark, however, L.W., in collaboration with other managers, determined Ms. Pomerantz's trial service would need to be extended by six months to allow her further time to get settled into the job. The expectation was that she would be successful.

Ms. Pomerantz's only report of workplace concerns came about a week after learning of her trial service extension in early October 2020. Ms. Pomerantz told L.W. that she thought the extension was discriminatory or retaliatory because of her race. L.W. reassured her it had nothing to do with her race, again explained the performance measures, and also reassured her that this was common for many employees who had onboarded during the pandemic. Ms. Pomerantz did not bring this concern up again prior to her resignation.

Based on the totality of the record before me, including relevant information from witness interviews and review of documents, I do not find sufficient evidence to substantiate Ms. Pomerantz's allegations that she was subjected to a racially hostile work environment and disparate treatment by her CRD colleagues and managers. The decision to extend

Ms. Pomerantz's trial service period was solely based on legitimate, objective performance management criteria and, even if it did rise to the level of an adverse employment action, I do not find that there is any causal nexus between this decision and her race. Because the record is clear that the decision was made prior to Ms. Pomerantz raising her concerns about the extension, it is unclear on what basis she is alleging retaliation. Regardless, there is no evidence in the record to corroborate any claim that the extension of her trial service was in response to any purported protected activity by Ms. Pomerantz. Similarly, though it is true that Ms. Pomerantz and the other new, Black investigators were assigned more intakes as compared to experienced, non-Black investigators, including by Black supervisors, that was purposeful in order to allow them time to learn the investigatory process before taking on a bigger caseload.

Finally, Ms. Pomerantz's allegations that she and other Black colleagues were "shut down" down in meetings may very well have been her perception, to which she is entitled, and I take her at her word. Though she did not describe it as a microaggression, one witness who did describe it in this way shared a similar observation about how one investigator—who generally is perceived as having a condescending tone regardless of the recipient—engaged with the new investigators in virtual staff meetings. The record did not support a link between this investigator's approach to CRD colleagues and their race. Ultimately, even assuming it to be true that a fellow, non-Black investigator colleague was dismissive or rude, that alone is not sufficient to satisfy the severe and pervasive standard.

### **C. General Allegations Regarding an Anti-Black Culture at BOLI**

Commissioner Hoyle's Administration has endeavored to diversify the Agency to better reflect the customers BOLI serves. BOLI also has undertaken internal diversity, equity, and inclusion ("DEI") efforts to help create a safe and welcoming environment for its workforce. Though BOLI is the state agency at the helm of civil rights enforcement in Oregon, it also is an employer and its employees bring their own experiences, culture, diversity, and the like into the workplace. Just like any employer, BOLI is not immune from workplace conflict or employee concerns.

But two Black women resigned in close temporal proximity, alleging they were subjected to inappropriate treatment based on their race and gender, and broader concerns have been raised that an anti-Black culture or bias is pervasive at BOLI. Accordingly, the scope of this investigation probed beyond the individual claims asserted by Ms. Johnson and Ms. Pomerantz and sought to elicit candid feedback from employees—particularly Black employees and other employees of color—willing to share their experiences and observations. Given that the vast majority of allegations asserted by Ms. Johnson and Ms. Pomerantz are styled as microaggressions driven by implicit bias, understanding the broader cultural context of BOLI also informs that analysis.

On the whole, employees past and present, including employees of color, have positive feedback about the workplace culture, even in the throes of the pandemic and work-from-home challenges. Of particular relevance is the fact that women of color, including a current Black leader at BOLI, have not experienced an anti-Black culture, or an attempt to discredit their position, experience, or authority. BOLI's internal DEI work has been fairly well received, though there is always more to be done. Where there is a bit of a disconnect is in the investigator

ranks. At least two Black employees, one being Ms. Pomerantz, report having experienced varying degrees of unwelcomeness, exacerbated by remote work and onboarding methods. While the experience of every employee of color is important and cannot be overlooked, the investigation did not reveal an anti-Black bias or culture on a pervasive level.

### **III. Investigation Methodology**

Over the course of this investigation, I interviewed Commissioner Hoyle, Deputy Commissioner Shepard, and 18 additional fact witnesses—including current and former CRD personnel, individuals who worked closely with Ms. Johnson and Ms. Pomerantz, two human resources (“HR”) professionals who supported BOLI,<sup>1</sup> and others who I learned throughout the course of the investigation may have relevant information or perspectives to offer. Though there may have been other witnesses with relevant or thirdhand information, my intent was to be as thorough as possible based on the nature of the allegations but also mindful of confidences and privacy for those involved. I also wanted to ensure I was hearing from a diverse witness group to the extent possible, particularly women of color.<sup>2</sup> Due to the COVID-19 pandemic, all interviews were conducted via video conference with limited exception.

Ms. Johnson undoubtedly is an important witness with whom I wished to speak. I conducted a brief introductory call with her in late-August 2020, just as she was concluding her employment at BOLI. I advised her that I had been retained to conduct an independent investigation, wanted to ensure I had her contact information, and let her know that I would be in touch. After subsequent attempts to reach Ms. Johnson, I was contacted by her attorney, who advised that Ms. Johnson declined to meet with me in light of her ongoing civil matter against BOLI.

Before I closed the fact-finding portion of the investigation, I circled back with Ms. Johnson’s attorney to confirm whether it was still Ms. Johnson’s intent not to speak with me given her pending lawsuit, which was the case. Regardless, I invited Ms. Johnson to provide me the names of individuals with whom she wished for me to speak and any relevant documents. In response, Ms. Johnson’s attorney provided me with the rebuttal materials she had submitted to the EEOC, which contained a witness list (some of whom I interviewed). Ms. Johnson’s attorney also was helpful in responding to follow-up requests for additional information.

Similarly, Ms. Pomerantz also is an important witness with whom I wished to speak—initially as a fact witness and then later with respect to her own allegations regarding her employment at BOLI and assertion that she was subjected to mistreatment based on her race. Ms. Pomerantz’s attorney confirmed, on behalf of her client, that Ms. Pomerantz would not meet

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<sup>1</sup> For years, BOLI had contracted with the Department of Business and Consumer Services (“DCSB”) for human resources support until that relationship ended and BOLI hired its own human resources manager in the summer of 2020.

<sup>2</sup> I have sought to identify the ethnicity and gender of certain witnesses given the nature of the allegations, to the best of my knowledge based on the information before me. Though I hope this is not the case, any error or misgendering, if any be had, is unintentional.

with me given the pending litigation. I invited Ms. Pomerantz, through her attorney, to share any documents or witness names with me, and received nothing by way of response.

At the outset of each interview, I introduced myself and explained my role as an independent investigator and neutral fact-finder to look into workplace-related concerns. Though I encouraged confidentiality to the extent possible, including to help ensure the integrity of the investigation, I clearly explained that I could not guarantee confidentiality of the information provided to me and, ultimately, that a fair assumption is that all or a portion of my work ultimately may be a matter of public record. I solicited and answered the witnesses' questions before the interviews commenced to be sure, to the best of my ability, everyone understood the procedure, including that speaking with me was voluntary (which they all did—no one declined to speak with me). Also, all represented employees were advised they could have a union representative present if desired; some chose to do so, some did not.

This was a document-intensive matter, and the following were reviewed in the course of the investigation: emails (including but not limited to emails between or among BOLI leadership and Ms. Johnson, investigators, HR, and with or regarding Ms. Pomerantz); text messages; personnel records; exit interviews; memorandums from Ms. Johnson; EEOC submissions; tort claim notices and lawsuits brought by Ms. Johnson and Ms. Pomerantz; workplace surveys; communication with an external DEI consultant retained by BOLI; and BOLI's responses to public records requests.

My overarching goals were to determine what occurred and whether the alleged conduct did or did not take place, assess credibility where appropriate, ensure an unbiased and fair process, and, ultimately, determine whether there were facts and evidence sufficient to substantiate the allegations. At all times, I endeavored to examine this matter and evaluate witness credibility through a culturally competent lens, and specifically regarding issues of race and gender, including issues of explicit and implicit bias.

#### **IV. Summary of Ms. Johnson's Allegations**

According to Ms. Johnson's attorney, the full scope of her concerns is what is articulated in her EEOC complaint and tort claim notice (and as later conveyed in her lawsuit). Again, because Ms. Johnson declined to meet with me, I did not have the ability to probe any issues with her, seek clarification or context (including the identity of any of those subordinates allegedly targeting her), or assess credibility first-hand. Though not a substitute for hearing directly from a complainant and having the ability to engage in collaborative discussion, I certainly gave her allegations, as well as the information her attorney shared with me on Ms. Johnson's behalf, full and due consideration.

##### **A. Ms. Johnson's Allegations Against Her CRD Subordinates**

*Allegation 1:* Ms. Johnson alleges that several unidentified CRD subordinate employees targeted her for disparate treatment and hostility due to her race, color, and gender. By way of support, Ms. Johnson has further alleged the following general allegations:

- CRD staff demonstrated antagonism and resistance to programmatic changes she was developing or attempting to implement.
- CRD staff refused to follow her instruction.
- CRD staff disparaged her knowledge, education, and experience.
- CRD staff refused to complete assignments or directives.

Ms. Johnson also has alleged more specific allegations with respect to her subordinate staff:

- During a CRD staff training that took place in Salem on November 6-8, 2019, “primarily Caucasian staff mistreated two African American presenters.”
- From January to March 2020, one unidentified subordinate employee “yelled” at Ms. Johnson and another unidentified employee refused to complete a work assignment.
- Ms. Johnson alleges that after her hiring of three Black CRD investigators, Caucasian staff had a running bet as to which of her hires would quit first.
- Ms. Johnson alleges that unidentified CRD investigators were “openly antagonistic” towards her after she made statements to the media about BOLI’s handling of the Michael Fesser complaint.
- Staff misused a COVID-19 survey to discredit her authority and negatively affect her employment.
- One unidentified CRD investigator attempted to file a “bully boss” complaint with her union (SEIU Local 503) against Ms. Johnson, purportedly after learning Ms. Johnson was to be a guest speaker of SEIU Local 503 for its Juneteenth celebration, and staff used a SEIU Local 503 survey to discredit Ms. Johnson’s authority and negatively affect her employment.
- Staff used a third survey to complain that Ms. Johnson’s hiring of three African American investigators was “cronyism.”

#### **B. Ms. Johnson’s Allegations That She Reported Concerns to BOLI Leadership**

*Allegation 2:* Ms. Johnson alleges that she reported her concerns of a hostile and discriminatory work environment to “BOLI leadership” as follows:

- From September to November 2019, she reported her concerns of a hostile and discriminatory work environment.
- She reported the conduct of CRD staff during the November 6-8, 2019 training, but alleges no action was taken to address her concerns about microaggressions.



- During January to March 2020, she reported the conduct of one unidentified subordinate employee who “yelled” at her and another who refused to complete a work assignment.
- After reviewing the May 2020 COVID-19 survey results, Ms. Johnson alleges she reported to BOLI leadership her belief that she was being subjected to an ongoing hostile work environment based on her race, color, and gender and held to a different standard than her Caucasian predecessors, and that she specifically requested an immediate investigation. She further alleges that there was no investigation or corrective action taken in response to her reporting of workplace discrimination.
- On June 28, 2020, Ms. Johnson alleges she again reported to BOLI leadership via a memorandum of the same date that she was experiencing ongoing workplace discrimination.

### **C. Ms. Johnson’s Allegations Against BOLI Leadership**

*Allegation 3:* Ms. Johnson alleges that BOLI’s upper management gave Ms. Johnson no authority to admonish or discipline staff for work deficiencies, undermining her credibility and leaving her vulnerable to further discriminatory targeting and harassment.

*Allegation 4:* Ms. Johnson alleges that she was told that most African American professionals only last a few years in Oregon.

*Allegation 5:* Ms. Johnson alleges that after she reported concerns about workplace discrimination to BOLI leadership, Deputy Commissioner Shepard repeatedly called her into his office (including but not limited to September 19, 2019, October 15 and 17, 2019, January 21 and 31, 2020, and March 19, 2020) to discuss staff concerns with her implementation of new case handling protocol.

*Allegation 6:* Ms. Johnson alleges that at an unidentified time, Deputy Commissioner Shepard told her that he could fire her at any time.

### **D. Ms. Johnson’s Allegation That a BOLI Colleague Mailed Her a Package of Feces**

*Allegation 7:* Ms. Johnson alleges she received a package of feces in the mail at her home address from an anonymous source on June 25, 2020, and suspects that someone at BOLI is responsible.

## **V. Factual Background and Findings Regarding Ms. Johnson’s Allegations**

By the time Ms. Johnson arrived at the Agency, change management was well underway. The Commissioner assumed her post in January 2019. She came with a new vision for the Agency and immediately rolled out many changes, including bringing on a new Deputy Commissioner and letting go many of BOLI’s long-time leaders. In filling those roles, some of which took many months to fill, the Commissioner was committed to diversifying the Agency, including through external hiring. This was a time of transition for the Agency, as BOLI

leadership was just beginning to get its arms around the Agency and fill key leadership positions. For many CRD staff, this was an uncertain and even tumultuous time predating Ms. Johnson's arrival at BOLI.

Additionally, Ms. Johnson succeeded a former CRD Administrator who had held that position for many years and was well liked by many of her staff. Shortly after Ms. Johnson assumed her role, two of her three Operations Managers quit in the fall of 2019 (one of whom was described by several investigators as one of the best bosses they had ever had). It is assumed that Ms. Johnson was not only doing her job, but picking up the work of the two Operations Managers she lost which probably was not easy on her, particularly because she was new and there also did not appear to be much by way of formal onboarding for Ms. Johnson. Though Ms. Johnson replaced two of these manager positions in about April 2020, shortly thereafter, in June, she terminated one of her new hires and another Operations Manager (with whom she did not have a good working relationship) resigned. Change is never easy, and the leadership changes at BOLI alone, combined with months-long periods of vacant leadership roles, were not insignificant events and provide important context to frame the analysis of Ms. Johnson's allegations.

Based on the totality of the record before me, including witness interviews and review of relevant documents, I find the following:

**A. Ms. Johnson's Allegations Against Her CRD Subordinates**

With limited exception, Ms. Johnson's allegations of discrimination and harassment arise from the alleged conduct of her subordinate employees, and really just a handful of the several dozen employees who ultimately reported to her. Ms. Johnson has not identified a single subordinate bad actor by name in her EEOC complaint, tort claim notice, or lawsuit. Notwithstanding the vagueness of these allegations, I sought to elicit as specific information as possible from witnesses and from review of documents. To the extent information gathered in the course of the investigation sheds light on who, exactly, is alleged to have engaged in mistreatment of Ms. Johnson, that is specified below. All told, it appears that the issues involved a handful of CRD employees (some now former), nearly all of whom are women and/or ethnically diverse (though none of whom are Black women).

*Allegation 1:* In no uncertain terms, Ms. Johnson asserts that certain members of her staff treated her with such racial animus and hostility that, in combination with the feces incident, she had great concern about her health and safety and had no choice but to resign her employment. Ms. Johnson offers both general and some specific examples of what she perceived to be racial and gender-based animus directed at her by subordinates, addressed in turn below.

*General Assertions:* Ms. Johnson's general allegations are vague and, without identifying anyone by name or providing any specific examples, she alleges that CRD staff mistreated her due to her race, color, and gender by responding to her programmatic changes with antagonism and resistance; refusing to follow her instruction; disparaging her knowledge, education, and experience; and refusing to complete work assignments or directives. As set forth below, there is support in the record to corroborate that (1) certain staff indeed were resistant to Ms. Johnson's programmatic changes and, in particular, the manner in which she rolled them

out, (2) certain staff questioned whether she had taken the time to understand Oregon law and pointed out to her when they thought she was incorrect, (3) certain staff were critical of Ms. Johnson's leadership style and some felt targeted by her when they spoke up; (4) certain staff expressed concerns about workloads and the ability to meet the EEOC contractual obligations; and (5) staff requested Work Prioritization Plans, a right under the Collective Bargaining Agreement ("CBA"). The allegations about unidentified staff refusing to follow instruction or complete a work assignment/directive are nebulous and addressed, to the extent possible, below in response to her specific allegations about CRD staff. However, what is lacking on this record is requisite evidence to link staff's conduct articulated above (collectively and commonly referred to herein as "pushback") to Ms. Johnson's race, color, or gender, either explicitly or implicitly, or any evidence to support that any of those protected characteristics more likely than not motivated staff's actions about which Ms. Johnson complains.

All reports are that the CRD employees welcomed Ms. Johnson with open arms and were genuinely excited about her arrival to BOLI. Not just because she was filling a leadership position that had been vacant for many months, but also for the experience and expertise she brought to the Agency. Without question, BOLI leadership was thrilled with her hire and from the outset let her know that CRD was her department to run. No information was gleaned from the investigation to suggest that CRD staff had any negative reaction to the fact their new leader was a Black woman.<sup>3</sup> Even those investigators who ultimately were most vocal about Ms. Johnson's changes or leadership style expressed sincere excitement and hopefulness about her arrival at the Agency.

Notwithstanding things getting off to a good start, it did not take long for tension to emerge between Ms. Johnson and some of her staff. Very soon after her arrival, Ms. Johnson began identifying changes to investigation practices (*e.g.*, the need for rebuttal interviews and moving away from the letter-triage system). The Deputy Commissioner remembers Ms. Johnson sharing some of her thoughts about changes pretty much out the gate and he gave her the green light to move forward, particularly given her experience and expertise. Investigators described a lack of collaboration or effort by Ms. Johnson to learn and understand their jobs before she started changing things. They also describe a perceived lack of appreciation by Ms. Johnson for how changes would impact their caseloads. There also were reports of a lack of clear direction about changes and related expectations.<sup>4</sup>

There is no question that the emerging tension directly coincided with Ms. Johnson's rollout of changes to case processing and investigatory procedures. There also is no question

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<sup>3</sup> This of course does not conclusively capture any subconscious or hidden bias that an individual employee may have harbored. However, in speaking with about a dozen employees who reported to Ms. Johnson, and probing their experiences and observations to the extent possible to try to root out any bias, I did not learn information that would suggest Ms. Johnson's race or gender were negatively perceived.

<sup>4</sup> When C.C. stepped in as the Interim CRD Administrator following Ms. Johnson's resignation and gained access to the shared drive, she did not find any records from Ms. Johnson and so was unsure how Ms. Johnson had been going about implementing changes or whether there had been clear instruction. Notwithstanding this, C.C. continued to implement some of the changes Ms. Johnson sought to roll out and recognized them as positive.

that at least some investigators voiced resistance to programmatic changes. Investigators were not clandestine about their concerns. Some were very vocal—including raising them with Ms. Johnson, HR, managers, and BOLI leadership, including the Commissioner herself. As best as can be established on this record, it appears that about a handful of investigators had at least one or more exchanges with Ms. Johnson that I assume she encompasses in this allegation. One of the most vocal advocates for the CRD investigators was Witness B (Caucasian female), who also holds the role of union president.<sup>5</sup> Another vocal investigator who was not afraid to push back, including challenging Ms. Johnson on areas of Oregon employment law, was Witness L (Hispanic/Latino male). Witness L is an experienced investigator who also is known to speak his mind. In other words, the nature of his interactions with Ms. Johnson does not appear to be unique to Ms. Johnson. The few other investigators who pushed back or raised concerns about Ms. Johnson are Caucasian females, to the best of my knowledge.

By way of example, C.C., as the lead prosecutor, worked closely with CRD staff. Investigators came to her with concerns about Ms. Johnson. In receiving these reports, C.C. (who prosecutes civil rights violations on behalf of the Agency) did not observe or experience any of the CRD staff raising concerns in a way that indicated to her that Ms. Johnson's race or gender may be motivating them to complain. To the contrary, C.C.'s observation was that these concerns specifically related to the manner in which Ms. Johnson was implementing the work-related changes and the changes themselves. Investigators did not feel that Ms. Johnson was hearing their concerns or that they were being consulted. C.C. shared these concerns with Ms. Johnson who, according to C.C., responded by acknowledging that some investigators were pushing back at the changes but also shared her opinion that investigators did not want to do the extra work.

Some CRD investigators who more directly questioned Ms. Johnson's changes reported thereafter being targeted by her, including that she more closely scrutinized their work.<sup>6</sup> Some went to HR, and some went directly to BOLI leadership. At least some, including the union president, report that the Commissioner responded to staff concerns by questioning whether they would be treating Ms. Johnson this way if she were not a Black woman. The Commissioner reports hearing one thing from employees or the union president, *e.g.*, Ms. Johnson does not understand Oregon law or investigators' processes, she does not listen to them, she keeps giving them more work, and people are not happy, and then would hear from Ms. Johnson that none of this is true—she just had a group of certain investigators who did not want to do the work. Both

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<sup>5</sup> For example, the union president stated that after she went to the Commissioner and Deputy Commissioner about staff's concerns regarding BOLI's compliance with the EEOC contract, Ms. Johnson berated her for an hour and told her that she was not allowed to speak to Ms. Johnson in her role as union president about others or their experiences—rather, Witness C could only speak to Ms. Johnson about Witness C's own issues.

<sup>6</sup> It is beyond the scope of this investigation to reconcile whether this was the case and, further, of course I was not able to obtain Ms. Johnson's responses to information learned in the course of the investigation. Rather, this information is provided as context in an effort to more fully examine why there was a lack of trust and communication breakdown between certain staff and Ms. Johnson, and whether there were other, nondiscriminatory factors in play.

sounded credible, but they were saying very different things. Ultimately, BOLI leadership deferred to its manager.<sup>7</sup>

It is indisputable that there were tensions, and perhaps even turmoil for some, at CRD. Just as it was stressful for the witnesses who shared their first-hand experiences in the course of this investigation, I assume it was stressful for Ms. Johnson as well. Again, it is not for me to render an opinion about how her subordinates' conduct was perceived by Ms. Johnson or do anything other than to hear her and acknowledge her perception that bias was afoot. But, on this record, and as further examined in response to Ms. Johnson's specific allegations below, I do not find it more likely than not that the pushback Ms. Johnson experienced was motivated by her race, color, or gender. Stated another way, on the whole of this record, it seems more likely than not that any new manager in this situation who endeavored to lead CRD in the manner employed by Ms. Johnson, and in the midst of a global pandemic and broader administration change management, would have faced similar pushback regardless of race, color, or gender.

*Specific Assertions:* Findings related to Ms. Johnson's specific assertions regarding alleged CRD staff mistreatment of her due to her race, color, and gender are set forth below.

- *November 6-8, 2019 CRD Staff Training in Salem*

A CRD staff training took place at Willamette University in Salem on November 6-8, 2019, which included several outside speakers brought in by Ms. Johnson. Several of the witnesses interviewed attended this conference. None corroborate Ms. Johnson's allegation that Caucasian staff mistreated or were rude to two African American presenters.<sup>8</sup> The only type of disruption to any speaker identified in the course of the investigation involved a CRD investigator, Investigator A (Caucasian female), passing Ms. Johnson a note about required breaks on the first day.<sup>9</sup> All witnesses with first-hand accounts uniformly report that after Investigator A passed the note to Ms. Johnson, it was Ms. Johnson who stood up, interrupted the speakers,<sup>10</sup> stopped the presentation, and announced something along the lines of: if they did not take a 15 minute-break as someone had reminded her, they would be in violation of the union contract. Though there were occasions where attendees interacted with speakers or provided feedback, no one in attendance witnessed what they would describe as rude or disruptive behavior toward any presenter.

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<sup>7</sup> The union president and other witnesses corroborate that BOLI leadership supported Ms. Johnson unequivocally.

<sup>8</sup> Those in attendance also included C.C., the Chief Prosecutor, who now also serves as the Interim CRD Administrator and L.W., who Ms. Johnson promoted to Operations Manager.

<sup>9</sup> I received and reviewed a copy of this note. It reads in relevant part, "Hi Carol, I am so sorry to interrupt you – I just wanted to let you know that wage & hour laws (and our union bylaws) mandates that we take a 15 minute break for every four hours worked...I know this might mess with your schedule but I thought it was important for you to know, since we do enforce these laws. Thank you." (Emphasis in original.) Witnesses report that Investigator A passed the note to Ms. Johnson following about a seven-minute break that led some investigators to wonder why they were not provided with a 15-minute break.

<sup>10</sup> At least one witness believes these two presenters are African American.

The break issue came to the attention of the Commissioner and Deputy Commissioner that same day because Investigator A had called BOLI's Wage and Hour Division. Concerned about a potential BOLI charge against their new Civil Rights Administrator, the Deputy Commissioner immediately reached out to Ms. Johnson via text and email (and they may have spoken on the phone), to advise her of the meal and rest period requirements, and provide her with a copy of the CBA (which he left on her desk early the following morning). At the same time, the Deputy Commissioner also told Ms. Johnson that he would be in Salem the following day and would come by the training—not only to help defuse the break issue and to hopefully spare Ms. Johnson from the embarrassment of a grievance or BOLI charge being lodged against her,<sup>11</sup> but to address BOLI staff to “reinforce [Ms. Johnson's] leadership and our expectations.” Ms. Johnson expressed her appreciation (via email and text) for the Deputy Commissioner's support.

I do not find sufficient evidence to support that Caucasian staff mistreated two African American presenters. The evidence supports that the only interruption to a presentation during the November 6-8, 2019 training came at Ms. Johnson's behest.

- *Unidentified subordinates “yelled” at Ms. Johnson and refused to complete a work assignment*

Though Ms. Johnson does not identify the employee who allegedly “yelled” at her, by all accounts this refers to an exchange between Ms. Johnson and a senior CRD investigator, Witness C (Caucasian female). This incident occurred on about March 19, 2020, right at the outset of the COVID-19 pandemic and as BOLI was transitioning to work-from-home. It goes without saying that this was a stressful time for all. Operationally, BOLI lacked the infrastructure to support an immediate and smooth transition to remote work.<sup>12</sup> The Commissioner and Deputy Commissioner made it clear to managers that they needed to be flexible with staff—the work had to get done, but this was a tough situation and, particularly for people with families, there needed to be flexibility.

Notwithstanding the message about flexibility from BOLI leadership, Witness C said she received a subsequent email from Ms. Johnson that she interpreted as Ms. Johnson requiring them to do their jobs during regular business hours. Witness C was panicked because she had parenting responsibilities (a mother of three young children who had recently returned from parental leave), barely any PTO available, and could not afford to lose her job. She called Ms. Johnson to propose a flexible scheduling option and Ms. Johnson reportedly told her, “No, that's not going to work.” Witness C said she started sobbing and crying. Though she was emotional, Witness C denies yelling at Ms. Johnson. Ms. Johnson said they could discuss it more the next day at the office.

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<sup>11</sup> According to the Deputy Commissioner, there was no disputing that Ms. Johnson had violated the CBA and Oregon law by not building in required breaks. He also believed this to be completely unintentional and an innocent mistake on her part.

<sup>12</sup> By way of example, with limited exception no one had work-from-home capabilities, the job was paper intensive, there were only two VPNs for over 100 employees, and only a handful of people had laptops.

During a management team meeting the next morning, Ms. Johnson said that an employee had yelled at her the previous night. The Commissioner expressed her surprise to Ms. Johnson upon hearing it was Witness C. It was the Commissioner's observation that Ms. Johnson was "clearly offended" by Witness C's approach to her and Ms. Johnson went on to describe how Witness C was yelling and crying and disrespectful to her. This whole incident struck the Commissioner as odd—not only Ms. Johnson's "deep offense" to this situation (almost as if "how dare this woman raise her voice at me"),<sup>13</sup> but her lack of empathy for a working mother at the beginning of a pandemic.

Witness C and Ms. Johnson did meet the following morning. Just beforehand, Witness C had a brief exchange with T.R. (her immediate supervisor), wherein she asked him, "Well, do you know what [Ms. Johnson] had to say about the working from home situation," and he responded, "Yeah, it's a no." When they met, according to Witness C, Ms. Johnson said that she did not "appreciate her tone" in their phone conversation. Witness C explained to Ms. Johnson that she was sobbing because she believed Ms. Johnson to be telling her she basically was losing her job because she could not be available between 9 to 5. Witness C readily admits she was emotional, sobbing, and was pretty much begging for her job. Witness C told Ms. Johnson that her (Ms. Johnson's) position was inconsistent with that of the Commissioner. Ms. Johnson told her there was a management meeting that morning and they were all in agreement. Witness C asked for the denial of her scheduling request in writing and Ms. Johnson refused, saying words to the effect of, "No, we are talking about it now...you can take it up with HR or whoever you want but we are talking about it now."<sup>14</sup>

Panicked and crying, Witness C then went to Deputy Commissioner Shepard's office. (Ms. Johnson sent the Deputy Commissioner an email that stated, "Witness C is coming your way....") Though he described her as visibly upset, the Deputy Commissioner emphasized that Witness C was not inappropriate, let alone ranting, violent, or threatening. It took some time to calm her, and the Deputy Commissioner reassured her that they indeed were supportive of her working flexible hours.

The record before me is indisputable that Witness C was upset and sobbing, but it does not support a finding that Witness C "yelled" at Ms. Johnson in an insubordinate manner. Even if she did have a raised voice amid her sobs, and even if Ms. Johnson was off-put by Witness C's "tone," there are no facts whatsoever to support that Witness C's approach was driven by racial animus. Rather, the record is clear that the motivating factor for Witness C being so upset was Ms. Johnson telling her she would not have flexibility, which was contrary to the position taken by BOLI leadership, and which panicked Witness C with the concern that she was going to lose her job.

Turning to the allegation that an unidentified subordinate "refused to complete a work assignment," it is difficult to know with any certainty to whom or what Ms. Johnson is referring.

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<sup>13</sup> The Commissioner also commented that employees sometimes yell, including at their managers.

<sup>14</sup> It was emotional for Witness C to revisit this event. She shared that she was "just a regular employee" coming to Ms. Johnson who had the "power" to help her and instead Ms. Johnson "pounced on" the fact Witness C was in a vulnerable moment.

Witnesses, including the Deputy Commissioner, believe this may be directed at a former CRD Manager, L.H. (Caucasian female), as L.H. and Ms. Johnson did not get along.<sup>15</sup> There is information to suggest that Ms. Johnson made performance demands of L.H. that she could not meet (and questions were posed as to whether such demands were reasonable in the first instance), but it is beyond my ability to render any conclusion. More generally speaking, though certain CRD investigators certainly pushed back on or questioned certain changes Ms. Johnson was instituting and raised concerns about workloads, I did not learn of any specific instance that seems to rise to blatant insubordination.

- *Alleged “running bet” as to which African American investigator would quit first*

Again, Ms. Johnson does not identify which Caucasian employee was responsible for this alleged running bet. All relevant witnesses were questioned about this, including three of the four investigators hired by Ms. Johnson to which this allegation is ostensibly referring.<sup>16</sup> Not a single witness had any information to corroborate this allegation.<sup>17</sup> I also asked T.R. if he heard any such rumblings. He had not, and added that something like that would really surprise him. There is no basis in this record to substantiate this allegation.

- *Alleged antagonism following media statements regarding the Fesser case*

For purposes of this report, it is unnecessary to delve into the details of the Fesser case, which BOLI handled prior to the new Administration and Ms. Johnson’s arrival. What is relevant, however, is to examine who from BOLI took positions in the media that were viewed unfavorably by CRD staff. The Commissioner is the one who immediately addressed the matter, including by calling a staff meeting and making the decision to go to the press. Investigators interviewed confirmed (as the email communication further corroborates) that the frustration primarily was directed at the Commissioner (including for her Tweets) and, frankly, many let her know as much as they felt “thrown under the bus.” In fact, it did not seem to be on the radar of some of the investigators interviewed that Ms. Johnson even interacted with the press on this issue (it appears Ms. Johnson did one interview). The Commissioner describes that she intentionally “took the heat” on this because it is her Agency and she ultimately bears responsibility.

T.R. observed the climate around the Fesser situation as the investigators feeling unsupported by both Ms. Johnson and the Commissioner. He described investigators as feeling “attacked” and morale was low, but they were pushing back against the whole system, not just Ms. Johnson. They felt defeated and like they had no power. They were in a protective mode as

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<sup>15</sup> L.H. asserts being subjected to unprofessional treatment by Ms. Johnson, which she detailed through the exit interview process in June 2020 and our interview. It is beyond my scope to reach any conclusions about L.H.’s allegations.

<sup>16</sup> Ms. Johnson brought on four new CRD investigators in the April 2020 timeframe—three Black and one Hispanic/Latina employees. (There actually may have been a fifth hire but the length of employment was de minimus). Again, Ms. Pomerantz declined to be interviewed.

<sup>17</sup> Witness F heard second- or third-hand that someone in intake may have commented after Witness R resigned along the lines of not thinking they would be the first to leave. There was no mention of any bet or any other details.



they knew Ms. Johnson wanted to bring in more diverse investigators and believed Ms. Johnson wanted to fire some of them so she could do so. T.R. shared that he witnessed Ms. Johnson making people cry in meetings and had personally seen a handful of people come out of Ms. Johnson's office in tears (including Witness C).

All told, BOLI's public response to the Fesser situation—led by the Commissioner—represents another flash point illustrating the growing lack of trust and friction between some CRD staff and management. The evidence in the record indicates that the investigators were genuinely upset about how the situation was portrayed in the media (*i.e.*, they had screwed something up), and that this was not some trumped-up reaction intended to negatively impact Ms. Johnson's employment. Accordingly, the record does not support that the tensions around the Fesser situation, including the investigators' reactions, were in any way linked to Ms. Johnson's race, color, or gender.

- *Alleged mis-use of a COVID-19 survey to discredit her authority and negatively affect her employment*

In about May 2020, BOLI distributed an online "COVID Survey" to CRD staff to check in and see how people were faring with work-from-home. Questions and solicited feedback included, "Please share any suggestions you have to improve our COVID-19 operating situation" and "As we move forward, how can the Agency support you and your work at BOLI?" This was an anonymous survey, and responses ran the gamut—from direct feedback about work-from-home, safety concerns upon return-to-office, technology challenges, overburdened caseloads, and positive and critical comments about management. Constructive criticisms were levied at Ms. Johnson, but there also was criticism that ran up the chain to the Commissioner and Deputy Commissioner and down the chain to Operations Managers. The criticisms about Ms. Johnson's leadership and process changes echoed those that had been previously expressed by certain investigators.

BOLI leadership shared the survey results with Ms. Johnson, including the direct feedback about Ms. Johnson's leadership, as they felt it was important for her to know. At the same time, they also reassured her that they "had her back" in figuring out how to work through these issues and build a better relationship with her staff.

First, there is insufficient evidence in the record to support an alleged "mis-use" of this survey tool or that responses were made in bad faith. Regardless of the focus of the survey, it would be highly unlikely to solicit anonymous feedback from employees and *not* receive negative or constructive feedback, or feedback seemingly off topic, not to mention in the midst of a global pandemic. While some observations were that a more proper avenue for staff concerns or complaints would have been through HR or the grievance process versus this survey, those were not exclusive avenues for employees to raise concerns.

Second, there were comments that CRD management (assuming to include Ms. Johnson) did not understand the role of the investigator because they had never done it, could not relate to day-to-day realities of the job or additional obstacles presented in the work-from-home environment, were unfamiliar with Oregon employment law, and the like. Again, Ms. Johnson has every right to disagree with these assertions (in fact she described them as frivolous in her

May 23, 2020 Memorandum (“May Memo”)<sup>18</sup>), and I make no decisions as to whether they have merit. But the bulk of the critical feedback focused on how investigators were feeling and the impact of what they perceived as management’s deficiencies had on them. They highlighted a lack of trust and poor communication, feeling micromanaged, a perception that management assumed them to be incompetent, and a disconnect between the Commissioner’s office and other divisions of BOLI. Employees have the right to raise concerns about the terms and conditions of their employment—either individually or on a concerted basis. Employees were not demanding that Ms. Johnson be disciplined or terminated. They were not using language that would stand out as racist or gendered. Again, though I cannot conclusively discern any individual’s ultimate motive—particularly subconscious—it appears from the nature of these comments and information shared by witnesses during the investigatory process that investigators wanted help and felt no one was hearing them. Further, based on information received from multiple management-level witnesses, it also appears that investigators’ perceptions that Ms. Johnson viewed them as incompetent and not hard-working very well may be an accurate reflection of her view, at least with respect to certain investigators.

- *Alleged attempt by an unidentified CRD investigator to file a “bully boss” complaint with the union regarding Ms. Johnson and alleged use of a second survey tool to discredit Ms. Johnson’s authority and negatively affect her employment*

The “bully boss” issue is purely a union issue, and had nothing to do with BOLI management. The union members interviewed who were privy to the “bully boss” complaint were fairly tight lipped about the matter to protect union confidences, which is their right. Other than confirming a process for filing such a complaint exists under the union contract, and that it ultimately was not acted upon, there was little to be gleaned with one exception. That is, that Witness F (who holds a statewide leadership role for the union and also had a good working relationship with Ms. Johnson) proposed putting the “bully boss” complaint on hold and offered to mediate between the union president and Ms. Johnson to help bridge communication gaps and identify solutions to improve the working relationship. The union president was on board as was Ms. Johnson, at least initially, and Ms. Johnson wanted the Deputy Commissioner to attend with her. The meeting had to be rescheduled a couple of times and, when the wheels appeared to be coming off, the Deputy Commissioner stepped in and, on July 13, 2020, directed that, regardless of who asked for the meeting or subsequent communication breakdowns that had occurred, he was convening a meeting (to include Ms. Johnson, the union president, and additional representatives of their choosing) at the Commissioner’s direction to address CRD labor/management relations, division culture, and communication. He offered to bring in an outside mediator, if desired. Ms. Johnson resigned about a week later, however, so that meeting never came to fruition.

Separately, this particular survey to which Ms. Johnson refers also was purely union controlled—sent out by the union to its members. The survey results were never provided to BOLI management nor were they provided to me. According to Witness F, Ms. Johnson learned about the survey and the contemplated “bully boss” complaint, though he is not sure from whom, and wanted to know details. Given that this survey was not initiated by or shared with BOLI

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<sup>18</sup> Ms. Johnson’s May Memo in response to the survey, and BOLI leadership’s response to the May Memo, is discussed in more detail in Section V.B., below.

leadership, and thus they could not have relied upon anything in the survey with respect to Ms. Johnson's employment, it has no bearing on this investigation. And, to the extent represented staff exercised their rights under the CBA, those rights are protected.

- *Alleged use of a third survey tool to complain that Ms. Johnson's hiring of three African American investigators was "cronyism"*

BOLI's Diversity, Equity and Inclusion ("DEI") Committee sent out an Agency-wide survey in the June/July 2020 timeframe. Only about a dozen employees responded. Survey results were shared with the DEI Committee and BOLI leadership on about July 9. In response to the question, "What improvements could be made to the on-boarding process to improve our organizational culture?" one anonymous participant responded, "I worry that too many hires under this administration have been *crony hires*, by definition not equitable." (Emphasis added.) This statement came at the end of a lengthy response requesting more oversight in the hiring process and suggesting that, based on what appears to be second-hand information, hiring protocols may not have been adhered to with respect to recent hires.

It seems a fair assumption that this person was referring to Ms. Johnson's recent hires in CRD, which included four investigators of color, three of whom are Black. Given what she understood to be a history of internal hires at BOLI with no record of complaints about "cronyism," yet all of a sudden a criticism arises shortly on the heels of Ms. Johnson hiring three Black investigators, the Commissioner was not going to stand for what she perceived to be an insincere complaint as a cover for anti-Black bias in the workplace. Because she did not know with whom to address the issue, she called it out Agency-wide in her July 15, 2020 email; it was important for her to ensure a safe environment and welcoming culture for everyone at BOLI.

The fact that the Commissioner called out what she perceived as racism triggered staff reactions across the spectrum. Several employees of color expressed appreciation for her speaking up and noted that it was a novel (and welcome) concept to have a white boss call out racism so blatantly. Other employees (primarily Caucasian) were hurt and interpreted this to be the Commissioner calling them all racists. There was no investigation undertaken before the July 15 email as the comment was anonymous. The Commissioner subsequently has received additional context as to what was underlying the "cronyism" comment. This information, which was also corroborated by other witnesses, suggests there may be reasonable bases to question some of Ms. Johnson's hiring practices that have nothing to do with the race of those hired. It also seems that Ms. Johnson did have a pre-existing relationship with Ms. Pomerantz's mother, which reportedly was brought up by Ms. Pomerantz in front of CRD staff in a meeting. It is beyond the scope of this investigation to reconstruct Ms. Johnson's hiring practices, or make any determination whether those violated policy or law. Ultimately, because the record is inconclusive as to the unidentified employee's motivation behind the cronyism comment, it cannot be substantiated that this was racially motivated or otherwise ill-conceived.

## **B. Ms. Johnson's Allegations That She Reported Concerns to BOLI Leadership**

*Allegation 2: Ms. Johnson asserts that she raised concerns to BOLI leadership on numerous occasions.*

I fully vetted these assertions with both the Deputy Commissioner and the Commissioner (though the Deputy Commissioner was Ms. Johnson's direct supervisor and interacted with her more frequently), and reviewed numerous documents, in an effort to pinpoint, to the best of my ability, what it was that Ms. Johnson brought to their attention and when.<sup>19</sup> Though raising one or multiple concerns of being subjected to a racially hostile or discriminatory work environment is protected activity, asserting discrimination or retaliation is not, in itself, proof that discriminatory conduct has occurred. But whether Ms. Johnson raised concerns and the nature of her concerns, and what BOLI leadership did or did not do in response to those concerns, is important to my overall analysis. Findings regarding Ms. Johnson's assertions that she reported concerns of being subjected to a hostile and discriminatory work environment to BOLI leadership are as follows:

- *Reports from September 2019 through March 2020*

Ms. Johnson's alleged reporting from September 2019, through March 2020, can be taken together. Ms. Johnson's first complaint was to the Deputy Commissioner following a September 2019 staff meeting. Ms. Johnson asserted former Operations Manager C.L. (Caucasian male)<sup>20</sup> disagreed with her in front of staff, was disrespectful, and she believed his conduct was motivated by her race. For his part, C.L. recalls them talking about removing email verification on complaint processing and then he went around the room and had investigators report on current caseloads, which was his normal protocol, but recalled nothing heated. After the meeting, C.L. said Ms. Johnson let him know she was upset and interpreted his actions to be challenging her authority in front of staff, not being supportive, and told him he needed to get with the program. According to the Deputy Commissioner, staff shared observations that it was Ms. Johnson who was dismissive and demeaning of C.L. in front of staff, not the other way around. Very shortly thereafter, however, C.L. announced his resignation.<sup>21</sup>

Separately, though Ms. Johnson did not immediately characterize Investigator A's conduct in raising break concerns and/or exercising other legal rights in relation to the November staff training as racially motivated (*see* Section V.A., above), both the Commissioner and Deputy Commissioner did become aware of her perception (likely later in November 2019). Of course, it is impossible to know what Investigator A was thinking on November 6, 2019, when she passed Ms. Johnson a note and reportedly reached out to BOLI's Wage and Hour Division, particularly what may have been driving her actions on a subconscious level. But there is nothing to suggest that racial animus drove her conduct that day. Further, the record does support that BOLI leadership intervened to assuage the situation—the very next day—even before Ms. Johnson articulated her race-based concerns. Lastly, though Ms. Johnson shared her discontent with the Deputy Commissioner about some staff cross-talking or not paying attention

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<sup>19</sup> It does not appear Ms. Johnson raised any concerns with HR during her employment.

<sup>20</sup> C.L. was a long-term CRD employee who wore many hats during his tenure, including as the CRD Operations Manager (Portland) at the time in question.

<sup>21</sup> Some witnesses speculated that C.L.'s exit following his long tenure at BOLI was due to Ms. Johnson. According to C.L., however, he had one foot out the door before Ms. Johnson arrived and 95% of his decision to resign had nothing to do with her.

during the training, she never couched that conduct as racially motivated or indicative of microaggressions based on her or the speakers' race.<sup>22</sup>

As discussed in Section V.A., above, Ms. Johnson reported to BOLI leadership that Witness C “yelled” at her. Though Ms. Johnson characterized Witness C’s conduct as inappropriate, she did not express a concern that Witness C harbored racial animus or was subjecting Ms. Johnson to a racially hostile or discriminatory work environment, or describe this incident as a microaggression. Ms. Johnson alleges she was given no authority to take corrective action. The Deputy Commissioner denies that Ms. Johnson requested to discipline Witness C and, frankly, it is unclear on what basis Ms. Johnson would have to do so in any event.

Assuming the insubordination allegation refers to L.H. (*see* Section V.A., above), though there was a fractured working relationship between L.H. and Ms. Johnson, at no point did Ms. Johnson report to BOLI leadership that she perceived L.H. to be racially motivated or to be creating a racially hostile or discriminatory working environment. Rather, Ms. Johnson’s complaints were that L.H. was not doing her job and she wanted to terminate her. Deputy Shepard explained to Ms. Johnson that L.H. was not an at-will employee and, as a management service employee, she had job protections and certain progressive disciplinary steps had to be followed pursuant to Department of Administrative Services (“DAS”) Policy No. 70.000.02 in advance of termination. To be clear, BOLI leadership understood from Ms. Johnson that having L.H. continue in her position was untenable, and fully supported (together with HR<sup>23</sup>) Ms. Johnson’s desire to manage L.H.’s performance. But it would not have been prudent for BOLI leadership to allow Ms. Johnson to move forward in a manner that contravened DAS policy. Ensuring that Ms. Johnson executed progressive discipline and performance management in a manner consistent with policy, contractual, and legal requirements is not tantamount to hamstringing her authority. Based on witness accounts (include HR witnesses), and review of numerous documents, Ms. Johnson’s allegation that she was given no authority to take corrective action against L.H. (or any other subordinate for that matter) is unfounded.

More generally speaking and independent of any specific reports Ms. Johnson made, BOLI leadership was aware of her frustrations and employee morale issues.<sup>24</sup> As they did throughout her tenure, the Commissioner and Deputy Commissioner took Ms. Johnson at her word—including her belief that some element of staff’s resistance was rooted in bias. BOLI

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<sup>22</sup> Much later, in her May Memo, Ms. Johnson alleged with more specificity that several CRD investigators were so offensive and rude to an out-of-state civil rights trainer (a former Director at the U.S. Commission on Civil Rights) that he stopped his presentation to admonish them. There is nothing in the record, however, to support this allegation.

<sup>23</sup> Ms. Johnson did not appear to be very welcoming of HR’s support and at one point accused Witness J (DCBS HR Analyst assigned to support BOLI’s HR needs) of being biased due to an alleged pre-existing relationship with L.H. As the accusation of a pre-existing relationship between Witness J and L.H. was false, the Deputy Commissioner intervened to set things straight with Ms. Johnson in that respect.

<sup>24</sup> It cannot be overlooked that in this time period, tensions were running high, employees were at the early stages of navigating the pandemic and remote work, and on May 25, George Floyd was murdered.

leadership was hearing mixed messages, both sides of which seemed to be credible. Ms. Johnson's complaints seemed to focus on certain employees—whose names came up over and over again—who she alleged did not want to do their work and were not professional in their approach to her. Staff (including as articulated by the union president and others) were critical of Ms. Johnson's treatment of them, and concerned about their workloads and EEOC contract compliance. Also, around this time, represented staff requested Work Prioritization Plans under the CBA, which resulted in about 80 individual plans, and there was growing tension between Ms. Johnson and the union president. Though BOLI leadership, and particularly the Deputy Commissioner, were trying to improve relationships, there is no doubt that BOLI leadership came down on the side of Ms. Johnson and made clear to staff they were backing her.

- *Ms. Johnson's May Memo and reports following the COVID-19 survey*

As noted in Section V.A., above, BOLI leadership shared the results of this survey with Ms. Johnson, including the raw comments. Shortly thereafter, on May 23, 2020, Ms. Johnson submitted her May Memo to the Commissioner and Deputy Commissioner, entitled "BOLI Survey Response." I have thoroughly reviewed Ms. Johnson's May Memo, and though much of it is devoted to her responding to staff's survey feedback—what she deems to be "frivolous" complaints and reflective of the fact that they do not value her as their manager, as well as highlighting her experience and efforts undertaken while at CRD, she articulates the following concerns regarding racial hostility: (1) she has consistently been subjected to microaggressions from some CRD investigators; (2) the division is fraught with biases manifested in the numerous frivolous complaints and constant undermining of her work; (3) she felt she was held to a different standard than that of her predecessors and peers; and (4) the lack of positive staff feedback via the survey acknowledging the extensive training and efforts she has provided evidences the lack of integrity in the responses and underscores her assessment that biases have played a major role in perceptions and behaviors which perpetuates the stressful work environment.

Both the Commissioner and the Deputy Commissioner had phone conversations with Ms. Johnson after receiving the May Memo to discuss matters and reiterate their support of her. Ms. Johnson shared that she felt attacked, the comments were unfair and frivolous, and that investigators were biased because of her race. Deputy Commissioner Shepard described this as a turning point where race went from being more of a subtext (occasional comments that certain staff members were pushing back on her, unprofessional, or not wanting to do their work because she is a Black woman) to now Ms. Johnson articulating more directly her belief that staff's treatment of her was racially motivated.

This was the first time BOLI leadership recalled her describing staff's conduct as microaggressions. They sought to try and disentangle Ms. Johnson's race-based concerns with legitimate issues staff were raising about the workload, and particularly the EEOC contract compliance. They characterized the tenor of their conversations with Ms. Johnson in response to her May Memo, and going forward, as focused on moving CRD forward and continuing to support Ms. Johnson. Things were dysfunctional, there was a lack of a labor/management partnership, and they needed a plan to address the tensions and frustrations.

By way of operational support, they discussed the newly hired Operations Managers' ability to support her and help ease the tension with workload and process changes. According to the Deputy Commissioner, he reassured Ms. Johnson that he and the Commissioner had her back and were sticking with her process changes notwithstanding investigator pushback. Neither recall Ms. Johnson asking for any specific action. And, though Ms. Johnson characterizes the May Memo as requesting immediate investigation into workplace discrimination, that request is not stated within the May Memo nor does BOLI leadership recall her making this request. I inquired with BOLI leadership as to whether there was any discussion of conducting an internal HR investigation or bringing in someone from the outside after receipt of the May Memo. It does not appear there was such a discussion. Rather, they took Ms. Johnson at her word that she was experiencing what she believed to be microaggressions.<sup>25</sup> They focused on a plan to address the tension and frustrations and bring Ms. Johnson and her team together. They focused on trying to evolve the CRD internally and change culture, continuing to support Ms. Johnson, and to try and build the relationship between Ms. Johnson and her staff. In order to address the bias concerns more directly, they ratcheted up DEI efforts in the workplace, including with outreach to an outside DEI consultant and internal DEI committee.

- *Reports to BOLI leadership via a June 28, 2020 memorandum*

I first learned about Ms. Johnson's alleged reporting to BOLI leadership in late June 2020 of ongoing workplace discrimination after her counsel provided me with a copy of the rebuttal documents submitted to the EEOC on Ms. Johnson's behalf. A copy of a Memorandum dated June 28, 2020 ("June Memo"), addressed to the Commissioner and Deputy Commissioner, was included in those materials. Neither the Commissioner nor Deputy Commissioner recall receiving the June Memo, nor do they recall any discussion with Ms. Johnson about this document. I was unable to confirm that the June Memo actually was transmitted electronically to either the Commissioner or Deputy Commissioner during Ms. Johnson's employment (which was Ms. Johnson's typical way to transmit documents, particularly given the remote work environment at that time, and how her attorney advised it was to be delivered). All told, I am left to conclude that Ms. Johnson did not provide the June Memo to the Commissioner or Deputy Commissioner.

### **C. Ms. Johnson's Allegations Against BOLI Leadership**

*Allegation 3: BOLI's upper management gave her no authority to discipline her staff for performance reasons, leaving her vulnerable for discriminatory targeting and harassment.*

Both the Commissioner and Deputy Commissioner deny these allegations. Ms. Johnson's allegation is vague, and she does not identify any specific subordinate employee whom she wanted to discipline or admonish for work deficiencies but was in essence precluded from doing so by the Commissioner or Deputy Commissioner, or how that resulted in her being targeted for harassment. There is no question that Ms. Johnson addressed performance issues

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<sup>25</sup> I would note that neither in responding to the concerns Ms. Johnson raised in the May Memo, nor with respect to her expressing any other concerns, is there any evidence that BOLI leadership did anything other than validate her concerns, even to the point of telling certain staff members that if Ms. Johnson was not a Black woman, they would not be pushing back.

with respect to several subordinate staff during her tenure. For some, performance issues predated Ms. Johnson's arrival but had not been addressed by prior management which meant that progressive disciplinary steps under the CBA or DAS Policy No. 70.000.02 had to be followed. Leadership did not stand in Ms. Johnson's way when she wanted to fire her newly hired Operations Manager (Black male) just a few months into his employment, notwithstanding her prior feedback that he had been doing a great job.

I reviewed a significant amount of documentation related to Ms. Johnson's management of subordinate's performance and explored these issues with relevant witnesses. Though I was unable to confirm with Ms. Johnson directly, the collective thought is that she did not have prior experience managing a union workforce (Arkansas, where she previously worked, is a right to work state).<sup>26</sup> Accordingly, it appears she may have been unfamiliar with such concepts as progressive discipline, just cause, and the like. What the record bears out is that BOLI leadership, and HR when involved, were supportive of Ms. Johnson's desires and she expressed her appreciation for their support.<sup>27</sup> However, they also were obligated to provide feedback and recommendations to ensure that the disciplinary decision did not run afoul of the CBA or management services policy. It does not flow that this amounted to targeting. Frankly, had they not provided guidance, it is likely that Ms. Johnson's actions may have generated union grievances or other complaints.

*Allegation 4: Allegation that she was told most African American professionals only last a few years in Oregon.*

Ms. Johnson did not identify the individual(s) who allegedly told her that most African American professionals only last a few years in Oregon. I inquired about this with both the Commissioner and Deputy Commissioner, and both are unequivocal that they never said that to Ms. Johnson, particularly in the context of responding to her reports of a racially charged work environment as alleged in her EEOC complaint (*see* Allegation 3). What the Commissioner did express to Ms. Johnson prior to her arriving in Oregon, however, was to candidly share with her that some of the Commissioner's friends who are Black professionals have found Portland a challenging place to be, particularly when coming from out of state. In other words, the Commissioner wanted Ms. Johnson to know what she was walking into and, by way of further support, connected Ms. Johnson with other Black female professionals (including in state government), even before she made the move to Oregon.

Similarly, the Deputy Commissioner recalls having candid conversations with Ms. Johnson wherein he shared that he had seen people coming from out of state, particularly

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<sup>26</sup> Though Ms. Johnson had significant experience in civil rights and particularly housing, and was accomplished professionally, it is unclear what experience she had managing large teams prior to BOLI.

<sup>27</sup> One example illustrative of this is a late-March 2020 email thread between Ms. Johnson and the Deputy Commissioner wherein the Deputy Commissioner let her know that he would "back her completely" as to imposing progressive discipline on employees with productivity issues. Ms. Johnson expressed her appreciation, found his feedback "most helpful," and added that she loved her job.



people of color, have a tough time. He wanted to acknowledge the broader context at play and that they were cognizant of it.

I do not find BOLI leadership's transparency with Ms. Johnson that Portland can be challenging for leaders of color, particularly those coming from out of state and outside of state government, to be inappropriate.<sup>28</sup> It would have been remiss for them to not be candid in this respect—particularly when Ms. Johnson was looking to uproot her life and move across the country.

*Allegation 5: Allegation that after she reported concerns, Deputy Commissioner Shepard repeatedly called her into his office to discuss staff concerns and implementation of new case protocol.*

The Deputy Commissioner met with Ms. Johnson on a regular basis—both before and after she raised concerns about her staff. But on this record there is nothing inappropriate about these specific dates alleged or any other encounter. First, there are no facts to support a causal nexus—that the Deputy Commissioner “repeatedly called Ms. Johnson into his office” *because* she had previously reported workplace concerns. Put differently, these meetings were not in retaliation for or in response to any reporting activity. Second, there is nothing to suggest that these meetings, individually or in combination, were disciplinary or constituted any sort of adverse action or even had any negative consequence on Ms. Johnson. What the record shows is that the Deputy Commissioner was providing support and direction to Ms. Johnson. Third, the Deputy Commissioner met with all of his direct reports on a regular basis. Fourth, there is nothing unusual or inappropriate about a manager meeting with their direct reports. Fifth, the Commissioner expected the Deputy Commissioner to be meeting with his direct reports regularly.

*Allegation 6: Allegation that the Deputy Commissioner told Ms. Johnson he could fire her at any time.*

Deputy Commissioner Shepard unequivocally denies ever threatening Ms. Johnson with termination at any point during her employment, or that terminating her ever even crossed his mind. He does admit, however, that in the context of explaining the job protections afforded to management service employees pursuant to DAS Policy No. 70.000.02 (such as L.H., whom Ms. Johnson wanted to terminate), he did explain that was not the case for Ms. Johnson's employment or his own employment—as they serve at the pleasure of the Commissioner.

Deputy Commissioner Shepard also recalled another conversation with Ms. Johnson, likely in the May/June 2020 timeframe when tensions were escalating between with Ms. Johnson and her staff, to which she may be referring. By way of context, he was reassuring her that her employment was not in jeopardy, and recalls the conversation as along the following lines:

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<sup>28</sup> By way of pure anecdote, there are few Black leaders in state government, and retention can prove challenging. The Commissioner expressed her commitment to moving the needle on this, and her hiring demographics thus far, particularly based on ethnic diversity, appear to support that idea.

“Yeah, Carol, you could have been fired at any time, but you haven’t been. You’re not going to be. You’re not going anywhere. I’ve got your back. We’re in this together.”

Additionally, review of emails and text messages between BOLI leadership and Ms. Johnson around this timeframe further supports that, while things were tense between Ms. Johnson and some of her staff, the relationship between Ms. Johnson and BOLI leadership was copacetic. By way of example, in late June 2020, Commissioner Hoyle recommended Ms. Johnson to Governor Brown for appointment to the Governor’s Public Safety Training and Standards Task Force. After confirmation of her appointment in early July, Ms. Johnson expressed her many thanks to the Commissioner and Deputy Commissioner for their support and that she was thrilled for the opportunity.

On the whole, the record supports only the conclusion that Deputy Commissioner Shepard was invested in Ms. Johnson being successful in her position. The same can be said for the Commissioner.

**D. Ms. Johnson’s Allegation That a BOLI Colleague Mailed Her a Package of Feces**

On July 17, 2020, just three days before submitting her resignation notice, Ms. Johnson reported to the Commissioner and Deputy Commissioner that a few weeks prior, on June 25, she had received a package of feces in the mail at her home. Ms. Johnson said she had reported it to the FBI and Portland Police Bureau (“PPB”), and they reportedly told her not to say anything so they could investigate. Given the seriousness of this incident, the Deputy Commissioner reached out to the Oregon Department of Justice immediately.

Witness F said that Ms. Johnson called him close in time to when it happened, and told him she was enlisting the help of the police. Witness F also reported that although Ms. Johnson did not mention anyone by name, she did believe this incident was linked to a BOLI employee and she was afraid that someone who did not like her now knew her address. Witness F perceived Ms. Johnson to be genuinely afraid for her safety.

Though Ms. Johnson does not identify anyone in her complaint, after reporting the incident to the Commissioner, there was speculation by Ms. Johnson to the Commissioner that two different investigators (both Caucasian women) may be responsible. One of the two was interviewed and expressly denied having anything to do with this incident. I had no basis to doubt her credibility in this regard and there was no objective information received in the course of the investigation that linked this investigator to the feces delivery in any respect. Though the other investigator (who reportedly lives in the same apartment complex as Ms. Johnson) allegedly responsible was not interviewed, none of those interviewed identified her as possibly involved, and there was no objective information received in the course of the investigation that linked this investigator to the feces delivery in any respect.

To my knowledge, to date no one from the FBI or PPB has contacted the Commissioner, Deputy Commissioner, or other BOLI personnel regarding this incident. My office also searched for information about any report to law enforcement or filing of a bias crime report with the City of Portland and came up short.

Ms. Johnson did include some information about this incident in her EEOC rebuttal submissions (including some photographs of the package). I invited Ms. Johnson's counsel to provide me with any additional information as to the incident itself or any ensuing report or investigation. Ms. Johnson's attorney represented that Ms. Johnson had reported the incident to the FBI and was interviewed; further, the FBI agent contacted PPB officers in the bias crimes unit, one of whom interviewed Ms. Johnson and also took evidence into custody. It is Ms. Johnson's attorney's understanding that PPB's report was sent to the FBI, and that both the FBI and District Attorney's office declined prosecution. Ms. Johnson's attorney also provided email communication between Ms. Johnson and the FBI agent on June 25, 2020, in which Ms. Johnson forwarded a copy of the May Memo and what I understand to be her initial EEOC charge, dated May 24, 2020. Ms. Johnson also wrote to the FBI agent that:

"EEOC contacted me last week to inform me that BOLI would be receiving the notice last week.<sup>[29]</sup> Today, I received in my mailbox a package containing feces. This is very disturbing and I believe a little too coincidental to be unrelated."

I left messages for the FBI agent and PPB detective but did not receive a return call. I have not seen a copy of any investigation report nor am I privy to what Ms. Johnson shared in her interviews. Ms. Johnson's attorney provided me with what I understand to be as clear of images of the package and mailing envelope that were submitted to the EEOC. The package was from AS Enterprises, aka "Poop Senders,"<sup>30</sup> which bills itself as selling the "ultimate gag gift" and completely anonymously with no paper trail. Based on the image I received, it would appear the package addressed to Ms. Johnson was postmarked (USPS prepaid) on August 15, 2020. If that indeed is the case, then that does not align with Ms. Johnson's reports that she received the package on June 25, 2020, and, if the package was not mailed until August 15, 2020, then Ms. Johnson's reports to the contrary would call into question her credibility for purposes of this

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<sup>29</sup> The record does not support that anyone at BOLI knew about Ms. Johnson's contact with the EEOC until July 2020, or that anyone had an issue with it. The Commissioner stated that she did not learn about Ms. Johnson's contact with the EEOC until July 3, 2020, when Ms. Johnson emailed her a memorandum stating that she had contacted the EEOC on May 24, 2020. In her July 3 communication, Ms. Johnson also wrote that she had taken no further steps with the EEOC, and remained committed to serving the Commissioner and Oregonians in civil rights work despite "deeply rooted systemic barriers within BOLI [that] present great impediments to an equitable workplace for [her] as an African American woman." After receiving this email, the Commissioner called Ms. Johnson to let her know she absolutely supported her. The first the Deputy Commissioner learned of Ms. Johnson's outreach to the EEOC was on July 6, 2020, when he was copied on an email from the Commissioner to Ms. Johnson. I have reviewed this email, and it is indisputable that the Commissioner expressed her unequivocal support of Ms. Johnson, encouraged her to pursue every avenue she felt was necessary to ensure her rights were protected, and ensured her that she and the Deputy Commissioner were there to support her in any way they could to ensure her success. For his part, the Deputy Commissioner had no issue with it—he knew Ms. Johnson had relationships at the EEOC and was frustrated, so he thought nothing of her reaching out for support.

<sup>30</sup> Poop Senders, <https://poopsenders.com/> (last visited Aug. 12, 2021); *see also* Better Business Bureau, Complaints, AS Enterprises, <https://www.bbb.org/us/pa/allison-park/profile/novelties/as-enterprises-0141-71015624/complaints> (last visited Aug. 12, 2021).

investigation. Having no way to further probe this issue, however, I cannot draw any conclusions (and thus do not make any findings regarding Ms. Johnson's credibility in this regard).

But what I do conclude is that on the record before me, there is no evidence to link the feces delivery to Ms. Johnson's employment at BOLI or any particular BOLI employee or that it was in any way racially motivated.

#### **E. Ms. Johnson Submitted Her Resignation Notice on July 20, 2020**

On July 20, 2020, Ms. Johnson submitted her resignation notice to Commissioner Hoyle. In her letter, Ms. Johnson described that racially motivated hostilities had escalated, and also specifically referred to the feces incident as what she believed to be a racially motivated threat from a BOLI employee. She cited great concern for her health and safety given "escalating hostilities and [an] extremely toxic work environment." Though BOLI leadership expressed their disappointment to her to see her go, they were respectful of her decision. Ms. Johnson set her resignation date to be effective on August 28, 2020, and worked up until that date.<sup>31</sup>

The following day, on July 21, the Commissioner sent another Agency-wide email wherein she wrote:

"A little over a year ago now, [Ms. Johnson] left Arkansas to lead our CRD. In that time, she has experienced a level of hostility and racism in our agency that has led to her resignation."

Much like the Commissioner's July 15, 2020 email in response to the "cronyism" comment discussed in Section V.A., above, staff reactions to her July 21, 2020 email varied as well. In our interview, the Commissioner explained that her statements about Ms. Johnson being subjected to hostility and racism in the workplace were referring to the feces incident. All told, on this record it is clear that the Commissioner's statements in her July 21 email about Ms. Johnson's work environment at BOLI were conclusory in nature and not the result of any investigation into Ms. Johnson's allegations. Accordingly, those statements were considered along with all other information received in the course of the investigation, but are not binding on, nor do they influence, my independent findings.

#### **F. Additional Context and Findings, Including Concerning Microaggressions and Implicit Bias**

Ms. Johnson has not raised allegations of overt race or gender-based comments or conduct, and none were uncovered in the course of this investigation. What Ms. Johnson does allege is that through acts of what she experienced as microaggressions, certain unidentified, biased subordinates created a hostile and discriminatory work environment based on her race, color, and gender. Microaggressions may lead to a hostile work environment if sufficiently severe and pervasive and are increasingly recognized in discrimination cases.

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<sup>31</sup> Though I can make no conclusions about Ms. Johnson's decision to remain at BOLI for over a month following her resignation notice, I note that it seems a lengthy time to continue working in an environment she felt was unsafe, hostile, and toxic.

As noted at the outset of this report, given that this matter involves the alleged mistreatment of one of the few female African American leaders in Oregon state government, I sought to flesh out whether race or gender—expressly or implicitly—factored into witnesses’ observations about and treatment of Ms. Johnson. For example, whether the indisputable tension that existed between Ms. Johnson and some of her staff was owing to staff (including white staff) being unfamiliar with a Black woman in a leadership position and in a position of power over them. Though Ms. Johnson does not specifically allege this, I sought to uncover whether there was evidence of Ms. Johnson being subjected to the angry Black woman stereotype. Further, people’s perceptions are often rooted in cultural differences, and may be impacted by a number of factors including but not limited to race, geography, and gender. Differences in communication style also adds to the dynamics, and there was information to suggest that given Ms. Johnson’s background coming from Arkansas, her communication style is different from the “Oregon nice” communication style. Some witnesses, including Black witnesses who have grown up in Portland, talked about how discrimination and racism looks different in places like Arkansas and Oregon.<sup>32</sup> Also, as I have learned in the course of this and other investigations I have conducted involving Oregon state government employees, there is an inherent culture within Oregon state government at play.

The alleged wrongdoers are civil rights investigators and not one who was interviewed challenged the premise that implicit bias exists in all of us. Not one disputed that systemic racism is a real issue or took the position that BOLI was somehow immune from these types of issues, and certainly BOLI leadership recognizes this. Implicit bias does not usually just present itself in the course of an investigation absent someone having an “ah ha” moment and recognizing implicit bias within themselves, which did not surface in the course of this investigation (though many witnesses were introspective). But there are subtle ways it manifests itself, including when witnesses use language to describe a person of color that is inflammatory, “super-charged,” or even more easily recognized as racist, or use gendered language. Here, however, though certain witnesses were critical of Ms. Johnson’s leadership style and process changes, the record did not bear out the use of coded language.

Though each situation rises and falls on its own facts, and though there have been situations where I have concluded that it is more likely than not that bias based on race or gender factored into a witness’ actions toward and observations about the complainant, including owing to cultural insensitivities and unfamiliarity with a Black leader in state government, I do not find that to be the case on this record. What this record bears out is that the pushback and related actions by staff (described as microaggressions by Ms. Johnson) were more likely than not related to the process changes Ms. Johnson was making (*e.g.*, requiring rebuttal interviews, doing away with the case triage system, etc.), the manner in which she was implementing changes (*e.g.*, rapidly, without collaboration, and with being brand new to Oregon law), and how these changes were impacting what many already described as burdensome caseloads as well as a genuine concern that they were not going to meet the EEOC contract deadline.

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<sup>32</sup> T.R. described this as tough time for the Division, and Ms. Johnson was in a tough position not just being new to BOLI, but also being from Arkansas. Though T.R. grew up in Portland, both of his parents are from Arkansas. He pointed to such things as the difference in politics and in the social environment as it pertains to race between Portland and Arkansas, and believes the miss was in communication between Ms. Johnson and her staff.

It is important to make clear that even though there is insufficient evidence to substantiate Ms. Johnson's allegations that she was subjected to a hostile work environment or discrimination based on one or more of her protected statuses, this takes nothing away from Ms. Johnson's perception and experiences, and the impact of what she perceived to be microaggressions had on her. I am a white woman who was not in her shoes, nor were any of the witnesses. Particularly in the post George Floyd era, we need to listen to people of color who express feeling a difference in treatment in the workplace because of their race (and, here, also because of Ms. Johnson's gender). Accordingly, even though I did not have the chance to meet with Ms. Johnson, my only assumption is that she, both during her employment and subsequently, genuinely believed she was experiencing microaggressions because she is a Black female. Ultimately, however, findings as to whether or not actions were ill-motivated or rose to a sufficiently severe or pervasive standard must be rooted in objective facts and evidence, which goes beyond an individual's subjective experiences and beliefs.

In addition to the above findings, there was other information learned in the course of the investigation that is material to my findings and conclusions, including information and experiences shared by people of color most similarly situated to Ms. Johnson.<sup>33</sup> Again, though no witnesses were in Ms. Johnson's shoes, and their experiences are not dispositive of Ms. Johnson's, the personal experiences and observations of others who were most similarly situated provide important context. This is particularly true with respect to L.R., Administrator, Apprenticeship and Training Division (Black female), S.R., Administrator, Wage and Hour Division (Latina female), and T.R., former CRD Operations Manager (Portland) (Black male). I asked each of them, to the extent they were comfortable sharing, whether they had ever been subjected to inappropriate treatment at BOLI that they believed to be motivated by their race (or gender for the women) and, additionally, whether they ever heard or observed any conduct by investigators toward Ms. Johnson (including their pushback or alleged insubordination) they viewed as motivated by her race or gender. Apart from T.R. believing Ms. Johnson's termination of him was unwarranted, none of them report experiencing any mistreatment whatsoever at BOLI. They report positive relationships with staff and, importantly, feeling completely supported by BOLI leadership. Also, and though T.R. was most aptly suited in his particular role to observe dynamics firsthand, none of them shared any observations where they perceived investigators' conduct to be motivated by Ms. Johnson's race or gender or that Ms. Johnson had discussed that concern with them.

Additionally, many of the same investigators who Ms. Johnson claims were biased because she is a Black woman, had no issue with T.R. Though Ms. Johnson and T.R. are not identical comparators because T.R. does not have the intersectionality of race and gender, they are good comparators for examining race-based bias.

Importantly, T.R. reports having a good (even great) relationship with his staff—some of the same investigators who are assumed to have engaged in the alleged discriminatory conduct toward Ms. Johnson. T.R. received little to no pushback from his staff, which impressed him given the changes that were being instituted. One key distinguishing factor is what appears to be a material difference in T.R. and Ms. Johnson's management style. T.R. described Ms. Johnson

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<sup>33</sup> See also Section VII, below, for a broader discussion regarding alleged anti-Black bias at BOLI.

as a leader who had passion and competence, but lacked what he (as a former business owner) would consider to be valuable leadership traits: open, communicative, supportive, ability to build relationships with staff, and the ability to build trust. He described her as a divisive leader.<sup>34</sup>

He described his leadership style as making effort to get to know subordinates and support them, including by meeting with them regularly. Witnesses (including Caucasian staff) corroborated that they respected and trusted T.R., and he was able to build that trust within a brief time period. It was T.R.'s opinion (based on his observations and what staff shared with him), however, that for many staff Ms. Johnson was not perceived to build trust and was unhappy with the job they were doing, and they knew it. T.R. explained investigators were feeling tension and frustration because they perceived Ms. Johnson to be making sweeping changes but not explaining why. T.R. described the tension as follows: "[S]o that's where the pushback came—is one side trying to prove they're competent and the other side believing that they're not and there wasn't enough constructive communication...between the two." T.R. worked to bridge that gap and believed things were improving, including production and case management.

Acknowledging that no one can really know for certain underlying motivations or how those were perceived by or impacted Ms. Johnson, and that racism and systemic racism exist, he was not able to identify any experience or observation of staff's treatment of Ms. Johnson that struck him as racially motivated or gender bias. In T.R.'s opinion, he does not believe that the tension had anything to do with her being a Black woman. Rather, his view is that she came into a tough situation and sought to make huge changes at a rapid pace. Also, T.R. said that when he and Ms. Johnson discussed the pushback, they "never discussed it happening because she [is] Black." The conversations were about the investigators needing to change how they were doing things to better serve clients.

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<sup>34</sup> T.R.'s observations of Ms. Johnson being a "divisive" leader also derive from personal experience. In short, T.R. describes what started as a good relationship with Ms. Johnson (including a positive 90-day performance review) shifting after he (1) advocated for less severe progressive discipline for investigators based on CBA language; (2) spoke up in a staff meeting to try to get investigators on board with Ms. Johnson's expectations; and (3) disclosed issues with an intake backlog in a management meeting with BOLI leadership. T.R. believes Ms. Johnson saw him aligning with the investigators and no longer trusted him; he describes that "trying to stay loyal to [Ms. Johnson] while still getting [his] job done" was not easy. More specifically, after the staff meeting referenced above, expecting Ms. Johnson to express appreciation for his efforts, T.R. said that instead Ms. Johnson "chastised [him] and told [him] it's not [his] job to speak, she'll let [him] know when [he] can talk." He recalls her exact words being, "You need to know when to shut your mouth." (These reports also are documented in T.R.'s exit interview with HR.) Shortly thereafter, T.R. describes being terminated "out of the blue" by Ms. Johnson on June 12, 2020, and without a reason provided. Notwithstanding Ms. Johnson's alleged treatment of him, I did not perceive T.R. to harbor any ill will toward her; he was credible, candid, introspective about his time at BOLI and working relationship with Ms. Johnson, and provided important insight and context.

## **VI. Ms. Pomerantz's Allegations**

Ms. Pomerantz was one of the four investigators hired by Ms. Johnson in about April 2020. Consistent with the Commissioner's directive to hire outside of BOLI, and also the goal of diversifying CRD to better reflect the population of clients served, all four hires around this same time were people of color. Following a relatively brief tenure at BOLI, Ms. Pomerantz voluntarily resigned her employment as a CRD Senior Investigator, effective December 31, 2020. She set forth several concerns in her resignation letter, many of which refer to Ms. Johnson's concerns and are otherwise fully addressed in this report. Also, some allegations in her subsequent lawsuit go beyond the scope of her race-based hostile work environment and discrimination allegations that she alleged in her resignation letter, and are outside the scope of this investigation.<sup>35</sup> What is within the scope of this investigation are Ms. Pomerantz's allegations that she was subjected to a racially hostile work environment and discriminatory treatment while at BOLI. Ms. Pomerantz also raised broader concerns of a "culture of anti-Blackness, disparate treatment, and racial hostility" directed not just at her but at other Black colleagues, which is addressed in Section VII, below.

### **A. Summary of Ms. Pomerantz's Allegations**

Ms. Pomerantz alleges that throughout her employment at BOLI, she was subjected to a racially hostile work environment and disparate treatment by her CRD colleagues and managers. By way of support, she further alleges:

- That when she and other Black employees spoke up, made suggestions, or asked questions, non-Black CRD colleagues shut them down, as opposed to how she observed them treating other non-Black employees with courtesy and respect.
- That she and other Black investigators were assigned a disproportionate number of intakes as opposed to non-Black investigators.
- That BOLI's extension of her trial service was discriminatory and retaliatory, in that hers was extended but the same standard was not applied to other white employees. She alleges that in an October 2020 conversation, the Commissioner assured her she was doing a good job and had no concerns about her performance, yet nevertheless approved her extended trial service period.

Ms. Pomerantz also alleges that she reported the inappropriate conduct to which she was being subjected as follows:

- She voiced her concerns to the Commissioner and Deputy Commissioner, including in a July 23, 2020 meeting, but they failed to remedy her situation.

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<sup>35</sup> For example, allegations pertaining to a legislative panel presentation or how BOLI processes race discrimination complaints is far attenuated from the issue of whether Ms. Pomerantz, herself, was subjected to inappropriate treatment as a Black woman working at BOLI.



- She discussed these concerns with her supervisor, who responded that the environment and amount of support BOLI would provide to her was unlikely to change.
- She voiced her concerns via a SEIU survey that she understood would be anonymous.

## **B. Factual Background and Findings Regarding Ms. Pomerantz's Allegations**

In addition to the relevant factual background and findings set forth in response to Ms. Johnson's allegations, based on the totality of the record before me, including witness statements and review of relevant documents, I find the following:

Ms. Pomerantz was onboarded and trained by Ms. Johnson. During his time as Operations Manager (Portland), T.R. directly supervised Ms. Pomerantz. After T.R.'s separation, Ms. Johnson promoted L.W. (Caucasian female) into the Operations Manager (Portland) position, and L.W. began supervising Ms. Pomerantz in about mid-July 2020. It was L.W.'s practice to meet regularly (typically once a week) with her direct reports, which included the Portland CRD investigators. L.W. kept contemporaneous notes of her meetings with Ms. Pomerantz, which were reviewed in the course of this investigation in addition to interviewing L.W.

L.W. described having what she believed to be a good working relationship with Ms. Pomerantz. According to L.W., the first that Ms. Pomerantz shared with her any concerns or feelings of mistreatment was on October 8, 2020, about a week after L.W. advised Ms. Pomerantz that her trial service (*i.e.*, probationary) period would be extended by six months. Though she was not this explicit in her resignation letter, in her lawsuit Ms. Pomerantz alleges that the extension of her trial service period was discriminatory and retaliatory and that white employees were not subjected to the same standard.

As a threshold matter, I am unaware of any direct white comparators, as there were no other CRD investigators at that time in trial service other than Ms. Pomerantz, Witness D, and Witness F—all of whom are Black. (The fourth investigator hired at the same time by Ms. Johnson, Witness R, had resigned her employment shortly after she was hired to take a job in private practice.) All three investigators started at the same time and during the same set of circumstances (*i.e.*, starting a new job at the outset of a pandemic and in a purely remote environment). Witness D also worked in Portland CRD and had the same reporting chain as Ms. Pomerantz; his trial service was not extended. Witness F worked out of the Eugene office and reported directly to T.W., Operations Manager (Eugene) (Caucasian male). Witness F's trial service period was extended by two months. By the time I interviewed Witness F, he was out of his trial service period. Moreover, Witness F did not express that his extension (which he thought was three months) was unfair or discriminatory.

The decision to extend the trial service of both Ms. Pomerantz and Witness F was made collaboratively between L.W., T.W., and C.C. (who was serving as the Interim CRD Administrator), and BOLI leadership would have been made aware of this. Both received a similar communication from HR explaining their trial service had been extended (in accordance with the CBA) in order to "further develop [their] skills and knowledge for competent job

performance.” The extension did not impact a cost of living adjustment that went into effect at the same time. L.W. also understood from HR that the trial service period for many employees (including outside of BOLI) who onboarded during the pandemic was being extended, and she shared this with Ms. Pomerantz when she advised her on October 2, 2020, of the extension. L.W. reports that Ms. Pomerantz seemed to be very understanding and raised no concerns.

When they met the following week on October 8, after talking for about an hour about work issues, Ms. Pomerantz then brought up the trial service extension. Ms. Pomerantz said that after thinking about it, that the pandemic should not be held against her and because no performance concerns had been brought up she felt this was discriminatory or retaliatory because of her race—what “she had been warned about.”<sup>36</sup> L.W. explained this was not the case at all and the decision had nothing to do with her race. L.W. revisited all the reasons she had provided previously, emphasizing the time that L.W. was spending with her and that in order to advance from trial service Ms. Pomerantz needed to be able to work more independently. L.W. also reiterated that she was there to help her succeed and believed Ms. Pomerantz would be successful. Ms. Pomerantz said she would be submitting a written rebuttal because she disagreed with the decision. L.W. said the conversation ended on a good note. That same day, L.W. advised HR and her supervisor, C.C., of Ms. Pomerantz’s forthcoming rebuttal and her disagreement and concerns with the extension. The expectation was that they would meet after Ms. Pomerantz submitted her rebuttal. Ms. Pomerantz never did submit a rebuttal and did not revisit the subject with L.W. or anyone else at BOLI as far as I am aware.

For her part, the Commissioner would not have been directly involved with managing Ms. Pomerantz, so would have no basis to provide any direct or specific feedback. In the discussion on July 23, 2020, following Ms. Johnson’s resignation and discussed in more detail below, the Commissioner certainly shared that she was glad Ms. Pomerantz and the other investigators were at BOLI, but there was no performance-related discussion.

L.W. continued to meet with Ms. Pomerantz on a regular basis, and continued to provide her with hands-on coaching (including on time management and prioritization) and mentoring. During these meetings (and even back in September), Ms. Pomerantz shared her feelings of being overwhelmed by the workload and also by personal matters. In their early November meeting, Ms. Pomerantz shared that she was struggling with her mental health, her grandmother had passed, things outside of work were affecting her ability to do her job, and she was contemplating leaving. L.W. encouraged her to think about taking some protected leave versus resigning. Ms. Pomerantz took bereavement leave and when she returned let L.W. know that she had made the decision to leave. Ms. Pomerantz did not say anything to L.W. about resigning because of racial hostility or an anti-Black culture at BOLI.

Upon review of L.W.’s performance-related notes and related documents, and after interviewing relevant witnesses, I do not find there to be anything discriminatory or retaliatory about the extension of Ms. Pomerantz’s trial service period. Rather, the record supports that it was based solely on objective performance factors. L.W. had been working closely with and providing direct feedback and coaching to Ms. Pomerantz since mid-July 2020, including to help her progress and to work more independently. Apart from challenges presented by a remote

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<sup>36</sup> She did not identify who, purportedly, had warned her.

work environment outside of Ms. Pomerantz's control, Ms. Pomerantz had not completed much by way of intakes or investigations, so there was not much of an opportunity for L.W. to review her work product, and Ms. Pomerantz was requiring significant hands-on management time (which L.W. willingly provided).<sup>37</sup> By way of additional corroboration, T.R. directly supervised Ms. Pomerantz for about three months. During his supervisory period, he, too, had concerns Ms. Pomerantz would not make it past her probationary period and observed her to be struggling with intakes and not completing cases as compared to the other new investigators.<sup>38</sup>

Ms. Pomerantz also alleges she and other Black investigators were assigned a disproportionate number of intakes as opposed to non-Black investigators. As L.W. explained, the protocol (including before Ms. Johnson resigned and as continued by L.W. subsequently) was that new investigators would in fact have more intakes assigned to them as opposed to actual cases. Intakes provided the training ground for new investigators to learn the process. As they got up to speed, the number of intakes assigned would taper off as they took on a larger caseload. Accordingly, there is nothing in the record to support a finding that there was anything inappropriate, let alone discriminatory, regarding the intake assignment process.

Finally, Ms. Pomerantz alleges that she and other Black colleagues were "shut down" when they spoke up, made suggestions, or asked questions, yet other non-Black employees were treated with courtesy and respect. Notwithstanding the vagueness of this allegation, I explored these issues with relevant witnesses and did not learn of any specific situation to which Ms. Pomerantz may be referring. One witness, Witness D (Black male), did share his observation that the same investigator who he observed interrupting Ms. Johnson, also responded with what he described to be "smart remarks" to some of Ms. Pomerantz's questions. But according to other witnesses (including Caucasian investigators), they, too, have experienced this sharp or condescending tone from this investigator. Further, all meetings occurred virtually, and absent a few times Ms. Johnson required CRD staff to have cameras on, it was not uncommon for many to participate with cameras off. Ms. Pomerantz presented at one of the CRD training meetings but there were no reports that any non-Black attendees were rude or "shut her down." Ms. Pomerantz may be describing what she perceived to be microaggressions based on her race and, as noted above as to Ms. Johnson, I respect Ms. Pomerantz's perception and take her at her word. I also take Witness D at his word. But there are no objective findings in the record to substantiate mistreatment of Ms. Pomerantz because of her race that would rise to the level of discrimination or a hostile work environment.

As far as what Ms. Pomerantz alleges she reported and to whom, I find the following:

- Apart from their one discussion on October 8, 2020, wherein Ms. Pomerantz expressed to L.W. that she believed her trial service extension was discriminatory and

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<sup>37</sup> After Ms. Pomerantz's departure, it took L.W. about two weeks to get through the backlog of Ms. Pomerantz's cases to get them in order.

<sup>38</sup> T.R. also wanted to have one of the more experienced investigators who successfully managed their caseloads work with and mentor her. But he did not do so given Ms. Johnson's direction to the contrary (*see* Section VII, below, for additional discussion). His opinion is that it hurt Ms. Pomerantz not being able to communicate with and build relationships with other investigators.

retaliatory, L.W. stated that Ms. Pomerantz never raised any race-based workplace concerns to her, nor did I receive any information that Ms. Pomerantz raised concerns to her prior manager, T.R. There is no record support for the assertion that her supervisor told her that the environment and amount of support BOLI would provide to her was unlikely to change. Quite the opposite, the record establishes that both T.R. and L.W. were committed to supporting Ms. Pomerantz's success.

- Following Ms. Johnson's resignation notice, the Commissioner and Deputy Commissioner reached out to Ms. Pomerantz and the other two Black investigators to reassure them they were supported from the very top of BOLI.<sup>39</sup> While there certainly was direct acknowledgement and conversation that this must be disconcerting for them as new Black employees who have just had the person who hired them quit due to alleged racism, neither the Commissioner nor Deputy Commissioner recall any of the employees sharing their own experiences in the workplace, or expressing that they had been subjected to racism or racial hostility. Instead, the employees expressed appreciation for the outreach.
- Ms. Pomerantz did respond to the Commissioner's July 15, 2020 email calling out racism in regard to the "cronyism" complaint. Ms. Pomerantz expressed her appreciation for the Commissioner "calling out the REAL issues." The only thing Ms. Pomerantz shared with the Commissioner is that she gave feedback in the SEIU survey about the racial bias and hostility she had observed toward Ms. Johnson, other new CRD hires, and that had been directed at her personally. She also shared being shocked that what she believed to be her anonymous responses were, in fact, accessible by others and that she was in a process of filing a union grievance. Ms. Pomerantz did not report anything specific to the Commissioner or make any request of the Commissioner for assistance. She closed with:

"Thank you for being courageous and calling out racism. In my 44 years of living, this is the first time I've had a white boss call out racism directly and openly like you did here. Thank you. I look forward to continuing this work under your leadership."

- Finally, Ms. Pomerantz voiced her concerns via a SEIU survey that she understood would be anonymous. Witness F explained there was a glitch in the survey that failed to safeguard privacy at least for a period of time. Again, this is purely a union matter and BOLI management had no access to this survey or the results nor have I received the survey in the course of this investigation (despite requesting it).

Except as provided above, I do not find evidence in the record that Ms. Pomerantz voiced any other concerns or that she ever requested any action be taken on her behalf while she was employed at BOLI. Again, the record supports that while she did express her belief that her trial service extension was discriminatory or retaliatory based on her race, there is no objective

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<sup>39</sup> The Commissioner recalls conducting individual phone calls; the Deputy Commissioner recalls a virtual group meeting.

evidence in the record to support that Ms. Pomerantz's race was a motivating factor in that decision.

## **VII. Findings Regarding Whether an Anti-Black Culture Is Pervasive at BOLI**

Two Black women resigned their employment from BOLI within close temporal proximity and allege they were subjected to mistreatment while employed. Additionally, broader concerns about an anti-Black culture at BOLI were raised by Ms. Pomerantz and also were noted in some of the responses to the Commissioner's July 15 and July 21 all-Agency email communications. Accordingly, I was asked to provide any findings related to these more general allegations. Though BOLI is not immune from workplace challenges, including employees who believe they have been discriminated against as evidenced by the matters underlying this investigation,<sup>40</sup> and with the recognition that implicit bias and systemic racism exist, on balance people of color interviewed (eight witnesses, five of whom are Black), including managers, do not report being subjected to individual mistreatment or would describe BOLI as having an anti-Black culture. Of course, BOLI is not a sterile work environment and every workplace—BOLI is no exception—has room for improvement when it comes to diversity, equity, and inclusion.

Though not exhaustive, important highlights include:

- T.R.'s experience as a Black man in a management role at BOLI was great; Ms. Johnson's treatment of him aside, he felt he was treated great, including by his staff and BOLI leadership. He described the Commissioner as approachable.
- S.R. (Latina female), who started at the same time as Ms. Johnson and works at the same level as the Administrator of BOLI's Wage and Hour Division, reports that although she was more of a "slow change agent," she has been able to institute changes within her division without treatment by her staff she would deem to be inappropriate. While at BOLI, she has not experienced anything that she feels is directed specifically to undermine her authority, her role, her leadership, or her capacity to fill her role based on her race or gender.
- Though Witness F (Black male) could only speak of his colleagues in Eugene with whom he works closely, he shared that he personally has not faced any anti-Blackness from them. Additionally, and with respect to Ms. Johnson more directly, Witness F witnessed one or two interactions where he perceived someone as being rude or disrespectful to Ms. Johnson, speaking in a manner that he would not use to talk to a manager, but added that "staff being rude is not necessarily racism." Witness F did not hear any racist conversation about Ms. Johnson. He did add that the remote work environment has made it difficult to learn who was an ally.

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<sup>40</sup> During the course of the investigation, I became aware of other internal and external complaints and grievances, some based on race or ethnicity, including ones that had already been investigated or processed through the grievance process. These are well beyond the scope of this investigation but referenced as a matter of transparency.

- L.R. (Black female), who commenced her role as the Administrator of BOLI's Apprenticeship and Training Division, and moved to Oregon from Washington D.C., commented that BOLI is the first place she has worked where it is so diverse: "It's just so beautiful seeing a beautiful swath of...tones.... It's beautiful working here.... It really is, just seeing the openness of just conversation." L.R. describes the culture at BOLI as one where she can be her authentic self, and that it in fact is even opening her up to be more Afro-Centric, and she has been blown away with the openness of the environment. L.R. also was enthusiastic about the recent approval to hire a DEI professional in her division.
- Witness D (Black male) has not experienced any overt racism. He would not describe BOLI as anti-Black, but does not believe it is pro-Black and thus he does not feel welcome. This feeling of unwelcomeness has been exacerbated in the work-from-home environment but, without trying to make too much of a generalization, there is a difference for him whether he is talking about the administration (to include his direct manager) versus the investigators. Leadership does a better job of not giving him that feeling of unwelcomeness; the main feeling of unwelcomeness comes from the investigators. By way of example, he observed more apathy (which he described as "oozing through the screen") versus empathy in a virtual staff training meeting with an external DEI consultant BOLI retained. Put another way, he was disappointed with what he perceived to be a lack of engagement in the training.
- Witness A (Black male) did not experience an anti-Black culture or bias when he worked at BOLI.

On one other point of note, as noted above, Ms. Johnson brought on four new CRD investigators in April 2020, all of whom are people of color. Ms. Johnson made it clear, including to T.R., who supervised three of the four, that she was conducting their onboarding and training. Moreover, she instructed T.R. (and other witnesses corroborate this) that the new hires were to go to Ms. Johnson, not him, with questions and Ms. Johnson did not want the "old" investigators talking to the "new" investigators. He also believed that Ms. Johnson communicated this to the new investigators—that all contact or questions should come through her. Even if she was well-intended, *e.g.*, she wanted to train them under the new procedures she was rolling out, not facilitating collaboration and integration carried negative consequences as well. There was a feeling of separation—that the new investigators were "Ms. Johnson's hand-picked investigators"—which naturally divided the "old" versus "new" investigators, including along racial lines. And this was on top of the isolation that also came from onboarding in a remote work environment.

## **VIII. Conclusions**

### **A. Ms. Johnson's Allegations Are Unsubstantiated**

Based on the above findings, which derive from the totality of relevant information received in the course of this investigation, including witness interviews and review of documents, there is insufficient information to substantiate Ms. Johnson's allegations that she was subjected to discrimination or a hostile work environment based on her race, color, or

gender. Though some of the factual allegations underlying Ms. Johnson's assertions of inappropriate treatment are supported by the record as set forth in the above findings, most are not corroborated nor are the conclusions she drew from those events. Ultimately, and with full recognition that microaggressions can lead to a hostile work environment, on the whole of this record the requisite severe and pervasive standard is not satisfied.

Ms. Johnson's claims of discrimination require that there be an ill motive, either explicit or implicit, on the part of one or more alleged bad actors that caused Ms. Johnson to suffer an adverse employment action due to her race, color, or gender. Given that none of Ms. Johnson's assertions against BOLI leadership are substantiated, it comes down to whether one or more of Ms. Johnson's subordinates espoused the requisite animus and, further, that such animus was the factor that made the difference in how they treated her (again, mistreatment which she describes as microaggressions). Though a few subordinates were more vocal in their pushback toward her, and one or two may have even been rude or condescending on occasion, the record supports that the motivating factor for the investigators' conduct was Ms. Johnson's swift change in investigatory processes and protocols impacting investigators. There is insufficient evidence on this record that the pushback from investigators was motivated—explicitly or implicitly, directly or indirectly—by Ms. Johnson's race, color, or gender. Accordingly, the record does not support a claim of intentional discrimination based on Ms. Johnson's race, color, or gender.

#### **B. Ms. Pomerantz's Allegations Are Unsubstantiated**

Based on the above findings, which derive from the totality of relevant information received in the course of this investigation, including witness interviews and review of documents, there is insufficient information to substantiate Ms. Pomerantz's allegations that she was subjected to a racially hostile work environment or discrimination based on her race. A few months before her voluntary resignation, Ms. Pomerantz did tell her direct supervisor that she believed the extension of her trial service period to be discriminatory or retaliatory because of her race. The record, however, supports that the decision to extend Ms. Pomerantz's trial service period was based on legitimate, articulated performance reasons. Management's feedback to Ms. Pomerantz was that with some additional time, the expectation was that she would be successful in her position. Even assuming without deciding that this extension could rise to the level of an adverse employment action, the record is devoid of information of a causal nexus between this decision and Ms. Pomerantz's race.

Similarly, though Ms. Pomerantz and other similarly situated new investigators did receive more intake assignments as compared to more experienced investigators, this was intentional and for training purposes. There is no evidence in the record to support that race played any role in the work assignments for Ms. Pomerantz or other new CRD investigators who are Black, let alone was the motivating factor. Additionally, for a considerable portion of Ms. Pomerantz's tenure, the record supports that the intake assignments were at the direction of supervisors who are Black—Ms. Johnson and T.R. Finally, though one or two investigators may have been rude or condescending in CRD virtual staff meetings, the record does not support that this was an experience unique to Ms. Pomerantz or other new, Black investigators. Put differently, even more senior, Caucasian investigators reported being off-put by this investigator's tone and approach at times. Thus, there is insufficient information to tie the

alleged conduct of non-Black investigators to race and, even if there was, being cut off or treated rudely in a virtual staff meeting does not rise to the sufficiently severe and pervasive standard.

**C. The Record Does Not Substantiate a Pervasive Anti-Black Culture at BOLI**

Acknowledging that BOLI is not immune from employee discontent, allegations of wrongdoing based on race, or even systemic racism, the record does not bear out a pervasive anti-Black culture—either currently or at times material to the claims by and ultimate resignations of Ms. Johnson or Ms. Pomerantz. Again, though both Ms. Johnson and Ms. Pomerantz personally described experiencing BOLI as a racially hostile environment, and at least one other employee of color interviewed expressed a feeling of unwelcomeness by other investigators and would not describe BOLI as a pro-Black environment, the bulk of the feedback received from current and former employees of color does not describe a racially charged or anti-Black culture. Notably, women of color holding the same level of leadership positions as Ms. Johnson, including during Ms. Johnson’s employment, report the ability to work at BOLI as their authentic self, feel supported and welcome, and importantly, feel their authority and leadership is respected both up and down their reporting chains, even as they have rolled out changes in their respective divisions. Accordingly, though there always is room for improvement, I do not find that the close-in-time resignations of two Black women from BOLI is indicative of an anti-Black pervasive culture at BOLI based on the totality of relevant information received in the course of this investigation.