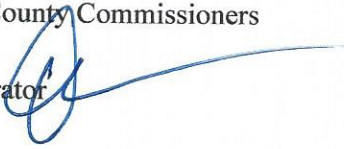


MEMORANDUM

TO: Clackamas County Board of County Commissioners

FROM: Don Krupp, County Administrator 

DATE: August 13, 2014

SUBJECT: Request for Payment of Outside Legal Counsel

In May of this year, I received individual requests from Commissioner Smith and Chair Ludlow to secure outside legal counsel to advise each during the course of the examination and evaluation of the merits of a discrimination complaint filed by Mr. Jared Anderson. These requests were made in reliance upon a determination that a potential for conflict exists with the provision of legal counsel services from office staff.

The policies and procedures for County officers and employees to retain outside legal counsel are defined by Board Order #2006-185, adopted by the Board of County Commissioners in May, 2006. The key element of the subject Board Order is that when conflicts prevent County Counsel from providing legal assistance to a County officer, that person may seek approval of the County Commissioners to pay for outside legal representation in order to protect that person from financial hardship. In doing so, the Board Order recognizes a presumption that any "claims or charges are unfounded unless or until otherwise proven."

The Board Order provides that requests for payment of outside legal representation be submitted to the County Administrator who then consults with County Counsel and forwards the request to the Board of Commissioners. Should the Board approve the request, County Counsel may assist in the selection of outside counsel. County Counsel is charged with monitoring performance of the retained outside counsel.

In response to the filing of a discrimination complaint by Mr. Jared Anderson, Commissioner Smith and Chair Ludlow each made individual requests for outside legal counsel. Per advice of County Counsel the forwarding of these requests to the Board of Commissioners was deferred until the investigation was complete and invoices submitted. I am now bringing these requests forward for Board consideration and action. I should note that each request should be regarded as independent and unrelated from the other. Each request should be acted upon individually by the Board based upon its own unique merits. Both Chair Ludlow and Commissioner Smith should recuse themselves from Board action involving their own request.

Upon review of the invoices, County Counsel has advised attorneys retained by Commissioner Smith and Chair Ludlow that time entries qualify as attorney work product and as attorney-client communications. He then requested each to formally waive any claim to such work product.

Request of Chair Ludlow

Chair Ludlow requests payment of outside legal counsel as follows:

- \$4,170 Hoevet Boise & Olson, PC
- \$3,676 Eric C. Winters

Mr. Winters was first retained by Chair Ludlow to assist in securing appropriate legal counsel with applicable subject matter expertise. Hoevet Boise & Olson were retained to provide expertise specific to the issues raised by Mr. Anderson's complaint. Total legal expenses incurred are \$7,846.

Mr. Anderson's complaint alleges that Chair Ludlow violated his right to privacy, made discriminatory remarks and retaliated against him for filing a complaint. An independent investigation of these allegations found that while Chair Ludlow's remarks may have been insensitive and inappropriate, he did not violate Mr. Anderson's right to privacy or engage in discriminatory treatment. Nor did the independent investigation find evidence of retaliation.

At the time of writing of this memo, a waiver of claim to time entry work product has been provided only as it relates to the statement for fees and costs from Hoevet Boise & Olson. County Counsel has yet to receive any such waiver from Mr. Winters. Consequently, I have not included a copy of Mr. Winters' invoices with this memorandum.

Options:

1. Approve payment for all invoices;
2. Approve payment of invoice from Hoevet Boise & Olson, PC; or
3. Decline payment of invoices

Recommendation: Given that Chair Ludlow was advised by County Counsel to secure outside legal counsel pursuant to Board Order #2006-185; given that County Counsel has received a waiver from Hoevet Boise & Olson and not yet from Eric C. Winters; and, given that an independent investigation of Mr. Anderson's complaint did not conclude laws and policies pertaining to privacy rights, discrimination and retaliation were violated, I recommend that Chair Ludlow's request for payment of invoices from Hoevet Boise & Olson, PC be approved by the Board of County Commissioners. Payment to Mr. Eric C. Winters will be made upon receipt of a waiver for attorney-client privilege for those invoices, respectively.

Request of Commissioner Smith

Commissioner Smith requests payment of outside legal counsel as follows:

- \$15,107 O'Donnell Clark & Crew LLP

Commissioner Smith retained O'Donnell Clark & Crew in early May, 2014 to secure outside legal counsel in response to the complaint filed by Mr. Anderson.

Mr. Anderson's complaint alleges that Commissioner Smith subjected him to discrimination and a hostile work environment, as well as retaliation for filing the complaint. An independent investigation of these allegations found that while Commissioner Smith's remarks about Mr. Anderson's work were distressing and unfair to him, she did not engage in discriminatory treatment or retaliation.

I should note that Commissioner Smith's legal expenses are substantial, even as they represent a \$3,050.34 reduction from the original billing. A total of 72.1 hours of time was spent assisting the Commissioner in this matter, about nine full days of work conducted over the course of one and a half months. However, a review of the itemized list of charges did not find any particular expense to be inappropriate. Consequently, staff has no basis upon which to recommend proportional payment without further detailed review.

Options:

1. Approve payment for the invoice;
2. Approve partial payment for the invoice; or
3. Decline payment of invoices

Recommendation: Given that a potential for conflict exists with the provision of legal counsel from internal County Counsel staff pursuant to Board Order #2006-185; given that County Counsel has received a waiver from O'Donnell Clark & Crew, LLP; and, given that an independent investigation of Mr. Anderson's complaint did not conclude laws and policies pertaining to discrimination and retaliation were violated, I recommend that Commissioner Smith's request for payment of outside counsel be approved by the Board of County Commissioners, the final amount of which is subject to a complete and thorough review by County Counsel of necessity and appropriateness.

Attachments

- Board Order #2006-185
- Invoice: Hoevet Boise & Olson, PC
- Invoice: O'Donnell Clark & Crew, LLP
- Letters of Completion of Investigation
- Report of Investigation
- Anderson Complaint

**BEFORE THE BOARD OF COUNTY COMMISSIONERS
OF CLACKAMAS COUNTY, STATE OF OREGON**

FILED

MAY 31 2006

Clackamas County Clerk

ORDER NO. 2006-185

In re the Matter of Adopting a Policy of
Providing Legal Representation for Officers
and Employees in Certain Circumstances



This matter having come before the Board of County Commissioners at its regularly scheduled business meeting of May 25, 2006; and

It appearing to the Board that there are certain situations in which County officers and employees may be the subject of claims, charges, or allegations arising from their official duties, but not within the Oregon Tort Claims Act; and

It further appearing to the Board that it is in the public interest that County officials and employees be protected from financial hardship in appropriate circumstances; and

It further appearing to the Board that from time to time it may also be necessary to retain outside legal assistance or representation in matters where County Counsel is precluded from providing legal services due to a conflict of interest, or in matters requiring special legal expertise; and

It further appearing to the Board that there should be a written policy establishing the process for determining the appropriate use of counsel in such circumstances. Now therefore, it is

RESOLVED AND ORDERED that Exhibit "A", attached and by this reference incorporated herein, is adopted and shall be used as the guide to process, evaluate, and decide requests for legal representation as set forth therein; and it is further

RESOLVED AND ORDERED that, although any officer or employee may seek representation or reimbursement as provided in Exhibit "A", nothing shall entitle any officer or employee to representation or reimbursement; the Board retains sole and exclusive authority and discretion to determine whether such action is in the best interests of the public.

ADOPTED this 25th day of May, 2006.

BOARD OF COUNTY COMMISSIONERS



Bill Kennemer, Chair



Recording Secretary

294 528

Policy and Procedural Guidelines Regarding

Retention of Independent Legal Counsel

Purpose

- 1). Defense of unmeritorious complaints relating to alleged ethical violations. The Oregon Tort Claims Act (OTCA) requires the County to provide county officials and employees with a legal defense in tort claims arising from the performance of their official duties. The Board of County Commissioners recognizes that it may be in the public interest to pay for legal representation for officials and employees in certain circumstances arising from the proper performance of their official duties that are not covered by the OTCA
- 2). Retention of outside legal services. The Office of County Counsel is responsible for providing legal services to the County; however, from time to time it may be necessary for the County to acquire outside legal assistance and/or representation in the event County Counsel is precluded from providing legal assistance due to a conflict of interest, or specialized legal services are required.

The purpose of this policy is to set forth the Board's intent and guidelines regarding the above-described circumstances.

Policy and Procedural Guidelines

Defense of alleged ethics violations. It is within the Board's sole discretion to consider requests to pay for legal representation for County officials and employees involving claims arising from the proper performance of their official duties but not covered under the OTCA. The Board has determined that it is in the public interest that County officials and employees be free of fear of personal financial hardship associated with such matters. However, nothing in this policy should be construed to entitle any County official or employee to a legal defense or representation, nor is it the intent of the Board in adopting this policy to pay for independent legal counsel for a County official or employee involving matters for which the County has established formal administrative procedures and processes, including but not limited to the personnel complaint and appeal policies and procedures set forth in Title 2 of the Clackamas County Code relating to disciplinary procedures and appeals. Further, the board shall in all cases, in light of new or additional information, retain the right to revisit and alter any decision to pay for a defense or representation and, in so doing, seek reimbursement of any public monies expended and, if unwarranted, pursue disciplinary action through appropriate channels.

In no event shall the Office of County Counsel provide primary representation to the official or employee. County Counsel may, however, provide information and assistance to the retained attorney as County Counsel deems consistent with the interest of the County and with the Code of Professional Responsibility governing attorneys.

EXHIBIT "A", p. 1

In considering a request, it shall not be construed that the Board of County Commissioners has undertaken or is required to undertake more than a preliminary assessment. Where claims or charges against an official or employee are involved, the presumption is that such claims or charges are unfounded unless or until otherwise proven. Should it later appear that the official or employee misstated or failed to disclose facts which, if known, would have influenced a decision or, in the event that claims or charges are validated through subsequent review, the County shall be entitled to recover any public funds expended on that person's behalf and to pursue discipline through existing processes. Further, if the Board pays for legal representation for an employee or official charged with violating a law, rule or regulation and such law, rule or regulation provides for payment of costs and/or attorney fees if the official or employee prevails, then the County shall be entitled to reimbursement of any recoverable costs and/or attorney fees incurred by the County.

In the event the Board chooses to pay for representation, the Board may impose certain terms and conditions including, but not limited to, monetary and scope of work limits. In no event will the County's payment of expenses exceed what is determined by the Board to be reasonable and prudent. Unless expressly provided for otherwise, the official or employee shall be principally responsible for payment. A commitment to pay for legal representation pursuant to this policy may involve direct payment of costs, as incurred, or the Board may elect to commit only to reimbursement upon satisfying certain conditions, such as exoneration of any claims or charges made against the official or employee.

Outside legal assistance. When it appears to the Board that it is necessary for a County official or employee to retain outside legal assistance and/or representation in the event of a conflict of interest, or there is a need for specialized legal services, County Counsel, unless precluded by a conflict of interest or otherwise, shall: a) Provide consultation services as to the necessity and appropriateness of outside legal counsel; b) provide advice as to the selection of outside legal counsel; and c) shall monitor performance of outside legal counsel performance and provide necessary and appropriate assistance.

Administrative Process

A request for the County to pay for legal representation must be submitted in writing to the County Administrator, who will consult with County Counsel and forward the request to the Board of Commissioners with or without a recommendation. Any such request must be submitted by the official or employee at the earliest opportunity, and prior to the employee or official making any arrangement for representation or incurring any cost or payment obligation.

The County Commissioners shall be the final decision maker in these matters.

EXHIBIT "A" pp. 2

294 530
2



1000 SW Broadway, Suite 1500
Portland, OR 97205
503 228 0497

JUN 10 2014

June 09, 2014

Clackamas
County Counsel

Invoice submitted to:

John Ludlow
john070@hevanet.com

In Reference To: *Jared Anderson Complaint*
Balance Due: **\$4,170.00**

Legal Services

		<u>Hours</u>	<u>Amount</u>
5/9/2014	WPB Telephone conference with attorney Eric Winters regarding John Ludlow; conference with Ludlow and Winters regarding allegations; conference with attorney Hoevet regarding allegations.	0.80	320.00
	RHH Office conference with John and Eric.	0.50	200.00
	RHH Read Jared Anderson complaint; read additional information including complaint procedure.	0.80	320.00
	RHH Telephone conference with Dana Sullivan.	0.20	80.00
	RHH Telephone conference with John.	0.10	40.00
5/12/2014	RHH Telephone conference and texts with John; travel to/from Clackamas County Counsel office; meet with John before interview; investigative interview; second meeting with John after interview.	3.50	1,400.00
5/15/2014	RHH Review draft summary of investigative interview of John.	0.50	200.00
5/16/2014	EAG Forward interview summary to Ludlow.	0.10	12.50
5/19/2014	MEM Legal research on confidentiality of complaint, whether there is any legal basis to keep the complaint and investigation confidential. Memo to and conferences with attorney Hoevet regarding same.	2.20	440.00
	RHH Review attorney McVicar legal research; office conference with attorney McVicar.	0.50	200.00
	RHH Exchange emails with John regarding draft.	0.30	120.00
	RHH Telephone conference with John.	0.20	80.00

		<u>Hours</u>	<u>Amount</u>
5/20/2014	RHH Read John Ludlow's notes; draft redline changes to Dana Sullivan's summary of investigative interview; send e-mail to Dana Sullivan; read email from Dana Sullivan's paralegal Morgan Hentrup.	0.50	200.00
	EAG Prepare redlined version of interview summary and email to Dana Sullivan and Morgan Hentrup.	0.20	25.00
5/28/2014	RHH Read email from John and from Stephen Madkour regarding public records request.	0.10	40.00
5/29/2014	RHH Telephone conference with Clackamas County Counsel Steve Madkour .2; exchange e-mails with John .2	0.40	160.00
6/1/2014	RHH Send email to John.	0.30	120.00
6/4/2014	EAG Email Dana Sullivan's final summary of interview to John Ludlow.	0.10	12.50
	RHH Exchange emails with paralegal Morgan Hentrup.	0.10	40.00
6/5/2014	RHH Exchange emails with Stephen Madkour, County Counsel; forward to John.	0.40	160.00
6/6/2014	RHH Read email from John.	0.10	NO CHARGE
6/8/2014	RHH Send email to John.	0.10	NO CHARGE
	<i>For legal services rendered</i>	<u>12.00</u>	<u>\$4,170.00</u>

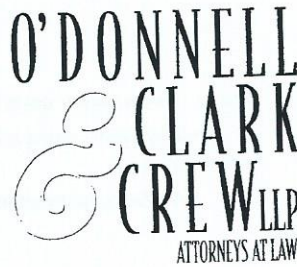
Balance due**\$4,170.00**

Statements are payable upon receipt.

A late payment penalty of 1% per month (12% per annum) will be assessed on any accounts not paid within 30 days.

~ For your convenience we accept VISA and MasterCard ~

Mark P. O'Donnell
Kelly Clark 1957-2013
Stephen F. Crew
Matthew D. Lowe
Also licensed to practice in Washington
Peter B. Janci
D. Adam Anderson
Maria Liesl B. Ruckwardt
Of Counsel
Also licensed to practice in Washington
Michael S. Morey
Of Counsel
Jacqueline K. Swanson



Fremont Place II, Suite 302
1650 NW Naito Parkway
Portland, OR 97209-2534

Ph: 503.306.0224
Fax: 503.306.0257

August 4, 2014

www.oandc.com
info@oandc.com

Charlean L. Smith
P.O. Box 226
Molalla, Oregon 97038

Re: Representation in Investigation of Clackamas County Internal Employee

Dear Tootie:

Enclosed please find our statement for services as of July 30, 2014 with respect to the above matter. I have authorized credits in the amount of \$3,050.34.

Our services, represented by the credit, were essential in the representation of your against this baseless claim. In my 40+ years of representing public officials, it is essential to advise the public official of statements to the media. It is called "limitation of risk."

To avoid any appearance of impropriety – helping you in your campaign, I have authorized a credit.

In presenting our Invoice for payment, please note the enclosure for the Martindale -Hubbell's rating for me, as well as Sam Ruckwardt's Rising Star selection from Super Lawyers.

Please feel free to call me should you have any questions. Thank you for this opportunity to be of service to you.

Sincerely,



Mark P. O'Donnell

MOD/mdc
Enclosures

Mark P. O'Donnell
 Kelly W. G. Clark (1957 - 2013)
 Stephen F. Crew
 Matthew D. Lowe
Also licensed to practice in Washington
 Peter B. Janci
 D. Adam Anderson
 Maria Liesl B. Ruckwardt
Of Counsel
Also licensed to practice in Washington
 Michael S. Morey
 Jacqueline K. Swanson



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 1650 NW Naito Parkway
 Portland OR 97209
 Ph: (503) 306-0224
 Fax: (503) 306-0257
 www.oandc.com
 info@oandc.com
 EN: 93-1256373

Statement as of July 30, 2014
 Matter ID - S7822.02

Charlean L Smith

PO Box 226
 Molalla OR 97038

S7822.02: Representation in Investigation of Clackamas County Internal Employee

Professional Fees

			Hours	Amount
4/30/2014	SAM	Conferral with M. O'Donnell regarding Clackamas county employee complaint (.2); Review employee's complaint (.2); Analyze possible age discrimination assertions in light of circumstances in preparation for conference with client (.1).	0.5000	137.50
4/30/2014	NAK	Received instructions from attorney; Received and review email; Print email from Tootie with complaint and other documents.	0.2000	29.00
5/1/2014	MOD	Review emails; Two telephone calls with client; Factual analysis.	0.9000	292.50
5/1/2014	SAM	Telephone conversation with client regarding the complaint by County employee (1.8); Second telephone conversation with client regarding information that other commissioners had access to complaint (.1); Review of County statutes and policies regarding procedure for investigating complaints and confidentiality (.3); Prepare email to County Attorney S. Madkour and administrator D. Krupp demanding maintenance of confidentiality (.2).	2.4000	660.00
5/2/2014	SAM	Telephone conversation with County Attorney S. Madkour regarding confidentiality issues (.2); Telephone conversation with client regarding the County's response to our confidentiality concerns (.1).	0.3000	82.50
5/2/2014	JA	Client file management regarding correspondence and email (.2); Receive instructions from S. Ruckwardt; Prepare chronological correspondence, as directed, for attorney review in preparation for client meeting; Prepare and forward email to J. Slater regarding instructions for conflict check; Reserve conference room for client/attorney meeting (.8).	1.0000	145.00
5/2/2014	SMN	Internet research and printing of information found related to Jared Anderson.	2.2000	319.00
5/4/2014	SAM	Internet based background search related to clients prior public comments of gay marriage in preparation for defending client	7.6000	2,090.00

O'Donnell Clark & Crew LLP

		(2.1); Listen to all council meeting publicly available to determine comment regarding any issues raised in complaint in preparation for defending client (3.4); Internet search regarding Commissioner Ludlow as it relates to the matters contained in complaint (.8); Outline issues and key points in response to complaint (1.3).			
5/5/2014	MOD	[NO CHARGE] - Revise letter and instructions to legal assistant.	0.2000	0.00	No Charge
5/5/2014	SAM	Meet with client in preparation for investigation interview (1.3); Telephone conversation with County Attorney S. Madkour regarding possible dismissal of complaint (.2); Review various email exchanges regarding need for investigation (.2); Telephone conversation with client regarding status of complaint and intent to go forward with investigation (.1).	1.8000	495.00	
5/5/2014	JA	Receive instructions from S. Ruckwardt; Finalize New Client Matter Report and Engagement Letter; Forward same to M. O'Donnell for signing and routing (.7); Receive instructions from M. O'Donnell regarding revisions to engagement letter; Prepare final of same and forward to client via email and US Mail (.3); Review public records search on Jared Anderson; Prepare and forward email to S. Ruckwardt regarding continuation of background check on same (.3).	1.3000	188.50	
5/5/2014	SMN	Legal research for memorandum on right of municipal governments to control and discipline elected officials.	3.9000	565.50	
5/6/2014	MOD	Review and prepare client for meeting with investigator.	0.3000	97.50	
5/6/2014	SAM	Meet with client in preparation for investigation interview, review in detail comments made at public meetings, and assist client in preparing responses to likely questions (2.1).	2.1000	577.50	
5/6/2014	SMN	Write memoranda on right of municipal governments to control and discipline elected officials (2.2); Discuss findings of research with S. Ruckwardt (.2).	2.4000	348.00	
5/7/2014	MOD	Six telephone calls concerning Eric W's compromising integrity of investigator; Instructions for letter to E. Sullivan.	0.7000	227.50	
5/7/2014	SAM	Travel to Clackamas County office to meet with client to further prepare for interview (.8); Meet with client to further prepare for interview (.7); Represent client in interview (1.0); Post-interview meeting with County Attorney S. Madkour to discuss process (.2); Discussion with client regarding possible budget cut affecting lobbyist and affect on complainant (.2); Return travel to office (.6); Discussion with M. O'Donnell regarding possibility of conflict with attorney representing Commissioner J. Ludlow (.1).	3.5000	962.50	
5/12/2014	MOD	[NO CHARGE] - Review with S. Ruckwardt strategy.	0.2000	0.00	No Charge
5/12/2014	SAM	Review and analyze summary of interview prepared by investigator (.3); Prepare email to client providing summary and discussing the same (.2).	0.5000	137.50	
5/13/2014	SAM	Telephone conversation with client regarding proposed revisions to interview summary (.4); Make revisions to summary and e-mail the same to client for final review (.9).	1.3000	357.50	
5/14/2014	SAM	Review email from client suggesting further revisions to interview summary (.2); Make final revision to summary and e-mail the same to investigator (.4).	0.6000	165.00	
5/28/2014	SAM	Review emails from client regarding completion of investigator's report (.1); Conversation with client regarding procedure for	0.8000	220.00	

		releasing report to respondents (.2); Prepare email to County Counsel requesting status of investigation (.1); Review public records request provided by S. Madkour and analyze the same regarding request for "complaints of hostile" work environment as complaint does not allege the same (.4).			
5/29/2014	MOD	Legal analysis; Conference call regarding relevance of complaint.	0.5000	162.50	
5/29/2014	MOD	Conferences with S. Ruckwardt and M. Lowe regarding public records issues.	0.4000	130.00	
5/29/2014	MDL	Conferences with S. Ruckwardt and M. O'Donnell to discuss public records issues.	0.7000	175.00	
5/29/2014	SAM	Review of relevant public records law to determine what documents related to the investigation of Complaint against client are exempted from disclosure (1.3); Conferral with M. Lowe to determine if a proposed summary or a Complaint investigation report is exempt from a public records request (.7); Conferral with M. O'Donnell in advance of telephone conference with client to discuss public records request and anticipated response to the same (.2); Telephone conference with client to discuss public records request and anticipated response to the same (.4); Prepare letter to County Counsel S. Madkour requesting to review the proposed summary of investigation report before client needs to give any opinion as to her position of the potential release of the same in response to public records request (.9); Review and respond to messages from client regarding the investigation report being provided to co-respondent Ludlow and purported content of the same (.2).	3.7000	1,017.50	
5/29/2014	SMN	Research regarding whether employment complaints against government agencies are discoverable public records.	1.2000	174.00	
5/30/2014	SAM	Review of email from client indicating meeting with County Counsel S. Madkour at noon and respond to the same (.2); Travel from Portland to Clackamas County Counsel's office to meet with S. Madkour (.7); Review investigator's submission and discuss the same with S. Madkour to determine the proposed time and scope of public records request response (1.6); Conferral meeting with client to discuss content of investigator's report and process of the investigation of the Complaint to date (.9); Return travel to Portland (.8).	4.2000	1,155.00	
5/31/2014	SAM	Telephone conversation with client discussing possible expansion of disclosure under public records request (.3); Strategy meeting with M. O'Donnell regarding the county counsel's possible expansion of disclosure under public records request and timing of the same (.1).	0.4000	110.00	
6/1/2014	SAM	[NO CHARGE] - Telephone conversation with client regarding status of the County's disclosure of information pending Mr. Anderson's acceptance of severance terms and possible requirements that she respond to questions about the same in a manner sensitive to the County's liability concerns (.3).	0.3000	0.00	No Charge
6/2/2014	MOD	Review Summary of Finding's regarding J. Anderson.	0.6000	195.00	
6/2/2014	SAM	Review email from client regarding a meeting request from County legal and employee services (.1); Review email from County attorney S. Madkour and attached summary of investigation prepared by County legal staff (.6); Travel to Clackamas County to represent client in meeting with County	6.5000	1,787.50	

legal and employee services (.8); Meeting with client in preparation for meeting (.3); Attend meeting in representation of client (.6); Review material provided by N. Drury regarding Complaint process, opportunity to submit supplemental materials, and formal letter from County regarding the investigation and discuss the same with client (.6); Review of supplemental materials provided by claimant prior to advising client on position of whether the same should be released (.8); Meeting with S. Madkour and E. Winters regarding his requested that Commissioner Ludlow and Smith make a joint decision as to the release of various portions of the Complaint related materials (.2); Meeting with E. Winters, Commissioner Smith and Commissioner Ludlow regarding respective position as to release of various portions of the Complaint related materials (.5); Meeting with S. Madkour and E. Winters representing Commissioner Smith's decision as to waiving any privilege of Complaint related materials (.2); Meeting with client regarding joint decision and advise as to possible request to have her letter revised as did Commissioner Ludlow in light of the content of the investigator's report (.7); Return travel to Portland office (1.1).

6/3/2014	MOD	Conference call client; Outline notes (.3); Three telephone calls with C. Smith (.2); Review Findings (.6).	1.1000	357.50	
6/3/2014	SAM	Telephone conversation with S. Madkour regarding Commissioner Ludlow's change in position as to release of the County's Complaint related materials (.2); Conversation with E. Winters regarding the same (.4); Multiple conversations with client throughout the day regarding the ongoing discussions by numerous County administrators regarding the release and the allegation that she is opposed to the release of all records (.5); Prepare email to S. Madkour confirming client's position that all materials, including the J. Anderson supplemental materials, be released in response to public records request (.3); Review Responsive email from S. Madkour confirming understanding of client's position (.1); Second telephone conversation with E. Winters regarding Commissioner Ludlow's position and desire to have unity with Commissioner Smith's opinion (.2).	1.7000	467.50	
6/4/2014	MOD	Outline, draft and dictate letter to N. Drury (1.9); Review investigator summary (.3); Revise letter (.3); Two telephone calls with C. Smith (.3).	2.8000	910.00	
6/4/2014	SAM	[NO CHARGE] - At the request of client prepare key talking points in advance of possible media requests so as to avoid any potential liability exposure (1.6).	1.6000	0.00	No Charge
6/4/2014	KDK	Receive instructions from attorney; Prepare draft letter to N. Drury; Revise draft letter to N. Drury; Send copy of draft letter to T. Smith via email; Provide copy of draft letter to M. Ruckwardt; Receive additional instructions from attorney; Additional revisions to letter to N. Drury; Send letter to N. Drury via email and first class mail; Send copies of same to T. Smith, K. Rastetter, M. Ruckwardt, J. Pasero and B. Barton via email; Organize documents for file; Paralegal services.	3.2000	368.00	
6/5/2014	SAM	[NO CHARGE] - Review material to be produced to press as to possible exposure by the media in preparation to responding to the same (1.6); Prepare email to client advising as to ongoing liability concerns related to any responses to these publications	1.8000	0.00	No Charge

		(.2).			
6/6/2014	SAM	[NO CHARGE] - Review of media coverage following the release of materials by County to advise client on ongoing potential liability concerns (1.0); Review and respond to emails from S. Madkour regarding media coverage (.2); Meeting with client regarding possible statement and content thereof (.6); Prepare email to client confirming talking points in light of recent media so as to prevent liability exposure (.8).	2.6000	0.00	No Charge
6/9/2014	SAM	[NO CHARGE] - Review of all recent publication of materials related to Complaint and investigation thereof as related to either client or Commissioner Ludlow (1.2); Conversation with client advising as to any responses related to the Complaint or investigation and current limitation of released information (.4).	1.6000	0.00	No Charge
6/10/2014	SAM	[NO CHARGE] - Review of media in advance of telephone conversation with client regarding Complaint related issues (.3); Telephone conversation with client regarding Complaint related issues and any issues of possible liability (.1).	0.4000	0.00	No Charge
6/11/2014	SAM	[NO CHARGE] - Telephone conversation with client regarding desire to make statement regarding Complaint and investigation thereof (.3); Review and revise proposed statement to decrease potential liability (.6); Review of Complaint and articles related thereto so as to have statement consistent with what already in the public record (.5); Review of email from County attorney S. Madkour regarding further public records requests (.1); Review second email from S. Madkour regarding guidance as to references of age or youth (.1).	1.6000	0.00	No Charge
6/13/2014	SAM	[NO CHARGE] - Review Clackamas County news articles and J. Anderson's recent letter to the editor related to Complaint against client to determine if any liability implications and email client regarding the same (.3).	0.3000	0.00	No Charge
6/16/2014	SAM	[NO CHARGE] - Telephone conference regarding continued publicity of Complaint and concerns of liability exposure (.2).	0.2000	0.00	No Charge

Sub-total Fees: 15,107.00

Rate Summary

Mark P. O'Donnell	0.4000 hours at \$	0.00 /hr	0.00
Mark P. O'Donnell	7.3000 hours at \$	325.00 /hr	2,372.50
Matthew D. Lowe	0.7000 hours at \$	250.00 /hr	175.00
Maria Liesl B. (Sam) Ruckwardt	10.4000 hours at \$	0.00 /hr	0.00
Maria Liesl B. (Sam) Ruckwardt	37.9000 hours at \$	275.00 /hr	10,422.50
Nancy A Kyker	0.2000 hours at \$	145.00 /hr	29.00
Jennifer Anderson	2.3000 hours at \$	145.00 /hr	333.50
Shain Neumeier	9.7000 hours at \$	145.00 /hr	1,406.50
Kristen D. Kaiser	3.2000 hours at \$	115.00 /hr	368.00

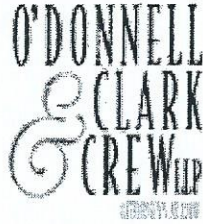
Total hours: 72.1000

Costs & Expenses

		Amount
6/17/2014	WestLaw. Online legal research fee.	60.34

Sub-total Expenses: 60.34
 Credit per Mark P. O'Donnell: 60.34

Total Current Billing:	<u>15,107.00</u>
Previous Balance Due:	0.00
Total Payments:	0.00
Total Now Due:	<u>15,107.00</u>



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Charlean L Smith
PO Box 226
Molalla OR 97038

Matter ID: S7822.02
Statement Date: 7/30/2014
Attorneys: Responsible SAM
Legal Assistant JA
Originating MOD
Billing MOD

Total Amount Due to Date: \$ 15,107.00

Smith, Charlean L

PLEASE REMIT TO:

O'Donnell Clark & Crew LLP
Fremont Place II Suite 302
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Portland OR 97209

(503) 306-0224
EIN: 93-1256373

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MAY 28 2014

Clackamas
County Counsel

Report of Investigation (Amended)
CONFIDENTIAL – ATTORNEY CLIENT PRIVILEGE

TO: Stephen Madkour and Kathleen Rastetter
FROM: Dana L. Sullivan
DATE: May 27, 2014
SUBJECT: Findings from Workplace Investigation into Complaint of Jared Anderson

I. Introduction.

Clackamas County first contacted me on April 23, 2014 and requested that I conduct an attorney-client privileged investigation regarding a complaint of discrimination made by Jared Anderson, a Government Affairs Specialist (Lobbyist) in the County's Department of Public and Government Affairs (PGA). I met with County representatives on April 24, 2014, and entered into a contract to conduct the investigation that same day.

Mr. Anderson's complaint was filed with the County's Department of Employee Services (DES) on April 22, 2014. Specifically, Mr. Anderson alleged in his complaint that: (1) Commissioner Tootie Smith subjected him to discrimination and a hostile work environment based upon his age, sexual orientation and/or his political party affiliation by making public statements calling into question his professional expertise and credibility and recommending that the County retain a contract lobbyist; (2) Board Chair John Ludlow violated his right to privacy by publicly revealing information regarding a medical emergency that Mr. Anderson suffered on January 30, 2014; and (3) Board Chair John Ludlow has made discriminatory remarks regarding women, and racial or ethnic minorities. During the course of the investigation, both in his interview and in typewritten personal notes that he provided on May 12, 2014, Mr. Anderson also alleged that the County commissioners subjected him to retaliation when, on April 28, 2014, the same day DES informed the Board of Mr. Anderson's complaint, the Board cancelled the presentation that the Public and Government Affairs team was to make during a study session regarding the County's legislative priorities for 2015 and has shifted responsibilities for developing a legislative agenda surrounding land use issues to Dan Chandler, thereby diminishing Mr. Anderson's scope of responsibility. Mr. Anderson also raised a concern, both during his interview and in his personal notes, that the County has failed to follow through with a resolution on diversity passed by an earlier Board.

II. Summary of Investigative Process.

As part of my investigation I interviewed Mr. Anderson, Chair of the Clackamas Board of County Commissioners John Ludlow, Commissioner Tootie Smith, PGA Director Gary Schmidt, Emily Klepper, Kimberlee DeSantis and Chris Lyons. I made typewritten notes during these interviews, which I subsequently edited for clarity and used as the basis for an interview summary for each witness. I provided each witness with a copy of my summary of his or her interview and asked them to make any necessary corrections or

additions, which I then incorporated. While I have retained the redlined copies of the summaries reflecting the changes made by each witness, I am only providing to you with this report the final interview summaries in which witnesses' changes have been incorporated. I have retained the witnesses' redlined versions and am happy to provide those upon request.

I also reviewed various documents as part of my investigation. The County provided to me a copy of Mr. Anderson's complaint and the attachments that he submitted along with the complaint. Mr. Anderson also provided me with the following materials at my request following his interview. These materials included: (1) a document entitled "Post-Interview Comments" elaborating upon the basis for his concern that statements made by Commissioner Smith critical of his work performance were motivated by discrimination based upon sexual orientation or political party affiliation; (2) a copy of the County's 2014 legislative agenda; (3) a detailed chronology covering events between October 2013 and present related to Mr. Anderson's complaint; (4) a July 2012 Board resolution regarding valuing diversity; (5) Mr. Anderson's performance evaluations for 2012 and 2013 and documents reflecting salary increases awarded to him; and (6) Mr. Anderson's resume. These supplemental documents provided to me by Mr. Anderson are enclosed as **Attachment A**. I also reviewed the audio recordings of Board study sessions on February 4, February 25, March 11 and April 2, 2014 and video recordings of Board business meetings on February 6 and 27, 2014. I also reviewed a visual recording of the front door and lobby of the County's Public Service Building on January 30, 2014, that was on a disc provided to me by Mr. Anderson.

III. Findings.

My findings regarding each aspect of Mr. Anderson's complaint are discussed separately below:

A. Alleged discrimination by Commissioner Smith.

i. Age discrimination.

Mr. Anderson contends that Commissioner Smith discriminated against him and Chris Lyons, the County's other lobbyist, on the basis of their age when she made public comments that called into question their experience and professional credibility and suggested that the County should retain a contract lobbyist. Specifically, Mr. Anderson contends that Commissioner Smith made comments to others, both within and outside the County, to the effect that he and Mr. Lyons were too young and inexperienced to effectively represent the County's interests in Salem.

Under Oregon law, it is an unlawful employment practice for an employer to discriminate against an employee in the terms and conditions of employment on the basis of age. ORS 659A.030(1)(b). The protected age group under state law is individuals 18 or older; therefore, unlike federal law, Oregon law prohibits discrimination on the basis of youth as well as discrimination against older workers. *See id.* Mr. Anderson is [REDACTED] years old. Chris Lyons is [REDACTED] years old. Both Mr. Anderson and Mr. Lyons fall within the protected class for age under state law.

Specific public comments to which Mr. Anderson objects are the following:

- Commissioner Smith's statements during a Board study session on February 25, 2014, to the effect that she had been down in Salem the prior day to lobby on HB 4078, the "land use grand bargain bill," and wanted to present to the Board a strategy on how to handle difficult legislative issues in the future. She further recommended during this study session that the County should hire a contract lobbyist who can be at the Board's beck and call and who would be in Salem every day;
- Commissioner Smith's comment during the Board's March 11, 2014 study session to the effect of "I'm at the point of having someone on retainer who is down there all the time – not that [our Government Affairs staff] aren't down there all the time, but a person who has lots of experience, who can read a bill note, know the flavor of the thing, and all the behind the scenes characters. I think we can benefit from that."
- During the Board's April 2, 2014 study session, the PGA staff presented a proposal for the development of internal processes and procedures to guide state-level Government Affairs activities in future legislative sessions. The proposal, drafted by Gary Schmidt, included a request for additional budgetary funds to hire a contract lobbyist. Commissioner Smith stated that she had made recommendations to Mr. Schmidt regarding enhancements to the department and she was happy to see them move forward.¹

Also of concern to Mr. Anderson is the fact that, on April 4, 2014, an article appeared on Oregonlive.com, entitled, "Clackamas County Strengthens Representation in Salem for Next Oregon Legislature Session." The article opens with the statement, "To be more nimble during the legislative session, the Clackamas County lobbying staff is making a few changes." Regarding the commissioners' intention to hire contract lobbying staff the author of the article states:

Gary Schmidt, director of the public and government affairs office, is also carving out money in his budget to hire outside lobbyists when needed. The county employs two people in Salem, plus Schmidt. However, sometimes, they are stretched thin, or need expert help on specific issues. The board suggested Schmidt feel freer to recruit help from outside staff to make sure the county gets a good deal on issues out of the county staff's expertise or availability. . . . The board and government affairs staff started recalibrating after the February session, when big issues, such as the land use grand bargain took county officials by surprise. They felt they got the short end of the stick, and were left out of deal-making.

Mr. Anderson's impression that Commissioner Smith's critical attitude towards the performance of the County lobbyists during the February 2014 legislative session was

¹ Mr. Anderson was not present during the February 25, 2014 study session, but learned of Commissioner Smith's statement when he listened to the recording of the meeting. Mr. Anderson was present during the March 11 and April 2 meetings and also listened to the recordings of those meetings.

motivated by their youth was based upon comments made to him by Board Chair John Ludlow. The first time that Mr. Anderson heard that there was any issue regarding his and Mr. Lyons' age was on March 11, 2014, when Chair Ludlow spoke to the PGA staff after the study session in which Commissioner Smith commented that the County could benefit by having someone down in Salem on a full-time basis who had significant experience. It is undisputed that, after the meeting, Mr. Schmidt, Mr. Lyons and Mr. Anderson were sitting in the lobbyists' office feeling very discouraged about negative statements made about their performance. Chair Ludlow walked by and Mr. Schmidt invited him to join the conversation and give words of encouragement to the lobbyists. Chair Ludlow made a statement to the effect of "Regardless of what has been said about your age, I think you've been doing a good job."

It is also undisputed that, during a meeting on April 16, 2014, attended by Chair Ludlow, Emily Klepper, Mr. Schmidt, Mr. Lyons and Mr. Anderson, Chair Ludlow referred to other commissioners, Commissioner Smith in particular, having an issue with the lobbyists' young ages. Chair Ludlow said that the comments were coming both from within and outside the County. Mr. Schmidt spoke up and clarified that the criticisms were originating from within the County and being shared with third parties outside the organization. Mr. Lyons and Mr. Anderson detailed their professional experience, which was impressive to Chair Ludlow and Ms. Klepper. Chair Ludlow suggested that the lobbyists post their bios on the County website so that others would be made aware of their experience. Chair Ludlow tried to reassure Mr. Lyons and Mr. Anderson that, regardless of what Commissioner Smith said, they were doing a good job.

In sum, while there is no dispute that County representatives expressed the view that Mr. Anderson and Mr. Lyons were hampered by youth and inexperience, there is a dispute as to who expressed that view and whether the statements were made in public or at one-on-one meetings. I find that, while none of Commissioner Smith's public statements upon which Mr. Anderson bases his complaint referred specifically to the lobbyists' age, Commissioner Smith did make statements in conversations with Chair Ludlow and possibly others the gist of which was that, in her view, the County's lobbyists were too young and inexperienced. Chair Ludlow and Emily Klepper, Chair Ludlow's Policy Coordinator, both recall Commissioner Smith making such statements during the February 2014 legislative session.

In her interview, Commissioner Smith attributed references to Mr. Lyons and Mr. Anderson being young and inexperienced to others, including Mr. Schmidt and either Commissioner Savas or Bernard. I did not find this assertion credible. Chair Ludlow and Ms. Klepper both clearly recalled Commissioner Smith referring to the lobbyists as "young and inexperienced" and I could identify no motive that either might have to be untruthful on this point. Further, nothing that Mr. Schmidt said during his interview gave any indication that he had reservations about Mr. Anderson's expertise or skill. To the contrary, Mr. Schmidt's comments on Mr. Anderson's performance evaluations include references to Mr. Anderson's "expertise," ability to "take the next logical step . . . without direction" (June 2012 evaluation), and his "insight and understanding of the legislative process, clear and strategic thinking, ability to get things done and clear and very effective organization skills." Mr. Schmidt also notes that Mr. Anderson has "a great understanding for policy and the ability to analyze and synthesize information into a recommendation for action" (June 2013 evaluation). Ms. Klepper stated credibly that Mr. Schmidt has consistently supported his

team. Mr. Schmidt was familiar with Mr. Lyons' and Mr. Anderson's professional backgrounds, which Commissioner Smith was not. Anyone reviewing Mr. Anderson's resume and performance evaluations would not have faulted him for lacking experience.

While I find that Commissioner Smith referred to Mr. Lyons and Mr. Anderson as young and inexperienced when criticizing their effectiveness in conversations with fellow commissioners and possibly others, I do not find that her comments are reflective of a discriminatory bias based upon age. Courts have recognized that not all references to age reflect a discriminatory bias. *See, e.g., Beshty v. Gen. Motors*, 327 F. Supp. 2d 208, 218 (W.D.N.Y. 2004), *aff'd*, 144 F. App'x 196 (2d Cir. 2005) (supervisor's description of his subordinates as a "young group" was simply a factual statement that they were relatively inexperienced and needed mentoring and was not evidence of age-related bias); *Pritchett v. Green Bay Food Co.*, 713 F. Supp. 1271, 1278 (E.D. Ark. 1989) (hiring preference for inexperienced individuals was not inherently discriminatory as older applicants could also be inexperienced). Certainly, Commissioner Smith's assumptions about the lobbyists' ages and their level of prior experience were erroneous. However, she stated credibly in her interview that she would have had the same reservations about a lobbyist in his 60s whose experience and limitations were comparable to her perception of Mr. Lyons' and Mr. Anderson's. Other witnesses who were aware of Commissioner Smith's reservations about the skills of the County's lobbying team described her concerns as being their perceived inability to advance the County's agenda with respect to the land use grand bargain bill.

I find it significant that it is undisputed that Mr. Anderson and Mr. Lyons received favorable feedback from the commissioners, including Commissioner Smith, for their performance during the 2013 legislative session and their age was not an issue. If Commissioner Smith harbored biased views of Mr. Anderson's and Mr. Lyons' capabilities, or lack thereof, based upon their age, that bias would have presumably colored her perception of their performance in 2013 as well.

To the extent that Mr. Anderson contends that Commissioner Smith's recommendation that the County retain a contract lobbyist constitutes an adverse action based upon his age, I find that Commissioner Smith's recommendation itself does not constitute an adverse action, as there has, as of yet, been no contract lobbyist hired and therefore no resulting change in Mr. Anderson's job duties. It remains to be seen whether the County proceeds with that recommendation during the 2015 legislative session and whether, if the County retains a contract lobbyist, it results in the diminution of Mr. Anderson's job responsibilities to the extent that a reasonable person would find the change materially adverse. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 71, 126 S. Ct. 2405, 2417, 165 L. Ed. 2d 345 (2006) (whether a reassignment of job duties is an adverse action depends upon whether a particular reassignment would be viewed as materially adverse by a reasonable person in the plaintiff's position, considering all the circumstances). I also note that, according to Mr. Lyons, the County retained a part-time contract lobbyist from Ball Janik during the 2013 session to assist with legislation addressing the issue of composting and neither Mr. Lyons nor Mr. Anderson contended that the retention of a contract lobbyist at that time was discriminatory or resulted in an objectionable reduction of their job responsibilities.

I also find insufficient evidence to support Mr. Anderson's contention that Commissioner Smith has subjected him to unlawful harassment due to his age. To establish a hostile work environment based upon age, an employee must demonstrate that he has been subjected to discriminatory treatment that was sufficiently severe or pervasive to alter the terms and conditions of his work environment or to create a working environment that is perceived as abusive, both subjectively and objectively. *Jamal v. Wilshire Mgmt. Leasing Corp.*, 320 F. Supp. 2d 1060, 1081 (D. Or. 2004). As discussed above, there is insufficient evidence to establish that Commissioner Smith or any other County representative harbored discriminatory animus towards Mr. Anderson due to his age.

Even had I found that Mr. Anderson's age was a motivating factor for Commissioner Smith, it is questionable whether the instances of alleged discrimination relied upon by Mr. Anderson are sufficiently severe or pervasive to rise to the level of a hostile work environment from an objective perspective. Mr. Anderson described only one instance – the March 11, 2014 study session – when he was personally subjected to criticisms by Commissioner Smith and on this occasion Commissioner Smith did not mention age. Other critical statements by Commissioner Smith were communicated to Mr. Anderson by others and it was only through others that Mr. Anderson heard any mention that his age was a factor. It appears also that Commissioner Smith's comments, including those passed along to Mr. Anderson by others, were reported to or heard by Mr. Anderson only a handful of times during roughly a four-week period. While it was evident that knowledge of Commissioner Smith's remarks was highly distressing to Mr. Anderson, I do not find that they created an objectively hostile work environment.

ii. Sexual orientation discrimination.

Mr. Anderson contends that Commissioner Smith began publicly criticizing the PGA staff only after she learned, just prior to the meeting of the Multnomah and Clackamas County commissioners to select a replacement for Representative Chris Garrett on January 29, 2014, that Mr. Anderson is gay and that he and his male partner have adopted a child. According to Mr. Anderson, he showed Commissioner Smith a photo of his adopted son, who is four years old. Commissioner Smith looked confused when she saw the photo and, after Mr. Anderson explained that he had his partner Joe had just adopted a four-year-old boy from foster care, Commissioner Smith handed the phone back to him with a facial expression that conveyed disgust. In light of the correlation between these events, he asserts that his sexual orientation was a motivating factor underlying Commissioner Smith's change in attitude towards the PGA staff and her recommendation that the County hire a contract lobbyist, thereby narrowing the staff lobbyists' scope of responsibilities. Mr. Anderson's conclusion that Commissioner Smith is biased against him because of his sexual orientation is also based upon positions that she has taken while working as a lobbyist for the Oregon Family Council.

Commissioner Smith stated that she learned that Mr. Anderson is gay sometime before Christmas, when Mary Jo Cartesegna, policy coordinator for Commissioner Jim Barnard, mentioned to her that Mr. Anderson is gay and was on leave because he and his partner were adopting a baby. Commissioner Smith agrees that, as she was walking into the commissioners' meeting on January 29, Mr. Anderson showed her a photo of his child. According to her, she was surprised that the child was not a baby. She denies that she

reacted with disgust; rather, she was surprised that the photo was of a four-year-old boy and she was nervous at the time, having never been through a similar process and being surrounded by numerous television cameras and reporters. Commissioner Smith denies that her knowledge that Mr. Anderson is gay impacted her perception of his work in Salem or his capabilities.

I do not find that Commissioner Smith's critical view of the PGA staff's performance during the February 2014 legislative session or her recommendation that the County hire a contract lobbyist were motivated by Mr. Anderson's sexual orientation. Commissioner Smith credibly explained during her interview that her reaction upon seeing the photo of Mr. Anderson's son was due to the fact that she had assumed he had adopted a baby and was surprised to see a picture of a young boy. Mr. Anderson's own account, on page two of his complaint, supports the same conclusion. According to his description of the incident, Commissioner Smith broached the subject by saying that she wanted to see a picture of his new baby. She was aware at the time of Mr. Anderson's sexual orientation, and this is not the overture that one would expect if Commissioner Smith were personally offended by the notion that Mr. Anderson, as a gay man, had adopted a child. According to Mr. Anderson's account, Commissioner Smith looked very confused upon seeing the photo and said, "Wait a minute?" This comment could not have been a reference to Mr. Anderson's sexual orientation, as the photo would not have provided Commissioner Smith with any information about Mr. Anderson's sexual orientation if she were not already aware that he is gay. Rather, the logical conclusion in light of the sequence of events is that Commissioner Smith's comment referred to the fact that the photo was of a young boy, not a baby. Mr. Anderson's complaint states that it was only after Commissioner Smith's expression of confusion that he made reference to his male partner.

The fact that Commissioner Smith, as a lobbyist for the Oregon Family Council several years ago, advocated against gay marriage does not itself lend support to the conclusion that Commissioner Smith's criticisms of the PGA staff were motivated by Mr. Anderson's sexual orientation. Rather, the weight of the evidence suggests that it was Commissioner Smith's frustration with the legislative process surrounding the land use grand bargain bill that prompted her criticisms. Commissioner Smith's criticisms were unfair, as she lacked information about either the lobbyists' ages or their experience, which is impressive. It is also apparent that the unsatisfactory outcome for the County was due to factors well beyond the lobbyists' control. However, the evidence does not support a conclusion that her criticisms were discriminatory.

iii. Discrimination based on party affiliation.

Mr. Anderson also contends that, during a meeting on April 16, 2014, Commissioner Smith, in an angry tone, expressed frustrations with Democrats in the legislature and asked Gary Schmidt, Chris Lyons and Mr. Anderson if they were Democrats. He alleges that Commissioner Smith questions the lobbyists' efficacy because of their party affiliation.

It is undisputed that the PGA team met with Commissioner Smith and Kimberlee DeSantis, her policy coordinator, on April 16, 2014 in Commissioner Smith's office. Commissioner Smith agrees that she expressed frustration with Democrats in the legislature and that she was "fired up" during the meeting. She also agrees that she asked the PGA staff

whether they were Democrats. She contends that, rather than conveying that the fact that the County's lobbyists are Democrats was an impediment in Salem, she meant to convey that the County could benefit from the fact that, as Democrats, the PGA team would have a foot in the door with Democratic legislators.

Under certain circumstances, subjecting a public employee to adverse action based upon his party affiliation can run afoul of the First and Fourteenth Amendments. *See Branti v. Finkel*, 445 U.S. 507, 518-19 (1980). Even assuming those circumstances apply here, I find insufficient evidence to conclude that Commissioner Smith subjected Mr. Anderson to adverse treatment due to his party affiliation. I find that, during the April 16 meeting, Commissioner Smith assumed that Mr. Lyons and Mr. Anderson were Democrats and, consequently, her frustration with the Democrats in Salem was directed towards them too. However, the evidence does not support a conclusion that Commissioner Smith's criticisms of PGA staff or her recommendation to hire a contract lobbyist in early 2014 was due to their political affiliation. I found persuasive Kimberlee DeSantis' point that Commissioner Smith had in the past been satisfied with the way that the PGA team had carried the County's message in Salem, regardless of her assumption that they are Democrats.

B. Alleged Violation of Privacy by Chair Ludlow.

Mr. Anderson alleges that, at the County's legislative dinner on January 30, 2014, and during public meetings on February 6 and 27, 2014, Board Chair John Ludlow shared information regarding a medical episode that Mr. Anderson suffered in the hallway outside his County office, in violation of Mr. Anderson's privacy rights. Mr. Anderson learned of these comments when he read an article in the *Portland Tribune*, dated March 3, 2014, in which Chair Ludlow's remarks from the February 27 business meeting were quoted.

The facts regarding Mr. Anderson's medical emergency are undisputed: In the afternoon of January 30, 2014, prior to the legislative dinner, Mr. Anderson suffered [REDACTED] [REDACTED] In extreme pain, Mr. Anderson collapsed in the hallway outside his office, which is near the commissioners' offices. Mr. Lyons was present and witnessed Mr. Anderson screaming and writhing in pain. Other colleagues whose offices were in the area came out into the hallway. Someone called 9-1-1. While the Fire Department showed up fairly quickly, it was quite a while before an ambulance crew arrived to transport Mr. Anderson. At some point, Chair Ludlow returned to the 4th floor and saw Mr. Anderson on the ground in distress. Mr. Lyons and Chair Ludlow had discussions about the length of time that elapsed before the American Medical Response (AMR) squad arrived.

After Mr. Anderson's collapse, Chair Ludlow investigated AMR's actual arrival time. He wanted to see how it compared to AMR's claim that they would arrive on site for an emergency within eight minutes. Chair Ludlow spoke to Bob Cozzie, director of the Clackamas County Department of Communications, who told him the sequence of events that followed the 9-1-1 call from the County. He also obtained from a County employee a disc containing security footage from the entrance of the building. The time stamp on the surveillance footage shows that the Fire Department arrived at 13:33:13 and the AMR ambulance crew arrived at 13:42:08. Chair Ludlow provided this disc to Chris Lyons.

- i. Comments at the Legislative Dinner on January 30, 2014.

The facts regarding Chair Ludlow's comments about Mr. Anderson at the legislative dinner are largely undisputed, although there is some question as to whether Chair Ludlow referred to Mr. Anderson crying or referred to the situation as "pathetic." At the dinner, Chair Ludlow served as the emcee. At some point during the dinner, he made remarks about each member of the PGA team. When he mentioned Mr. Anderson, he mentioned that Mr. Anderson was unable to attend the dinner due to a medical issue. While no witness had a clear recollection of exactly what Chair Ludlow said about Mr. Anderson's medical emergency, Chair Ludlow stated that he probably said something about witnessing Mr. Anderson writhing in pain. This is consistent with Kimberlee DeSantis' recollection.

Mr. Anderson reported that he heard from Mr. Lyons that Chair Ludlow stated at the dinner that he had "never seen a grown man scream and cry like that." When interviewed, Mr. Lyons stated that he recalled Chair Ludlow making statements at the dinner like "I have never heard a grown man cry like that." He was also told by Ben Eckstein, a staff person for Congressman Kurt Schrader, that Chair Ludlow concluded his remarks regarding Mr. Anderson by saying something to the effect of "It was all very pathetic." When these remarks were reported to Mr. Anderson he felt humiliated because the dinner is attended by fifty or more state legislators, congressional field representatives and legislative staff with whom he works in his role as a lobbyist for the County and for whom he might at some future date wish to work.

When interviewed, Mr. Lyons did not recall in detail Chair Ludlow's exact statements but he provided sufficient detail that the audience reacted with empathy. Because Mr. Eckstein declined to be interviewed as part of this investigation, I could not verify whether Mr. Eckstein would confirm that Chair Ludlow went so far as to state that he had "never heard a grown man cry like that" or to refer to the situation as "pathetic."

ii. Comments at public meetings on February 6 and 27, 2014.

According to the video of the Board's February 6, 2014 business meeting, during the Commissioners Communication segment of the agenda, Chair Ludlow remarked on the conflict surrounding AMR's bid to provide ambulance services and shared his concerns about deficiencies in AMR's proposal. He mentioned that, in a meeting the prior Thursday, a man made a comment to the effect that if Chair Ludlow needed help the man would put aside his personal feelings and provide him with the same outstanding service AMR provides everybody. Chair Ludlow then stated, "That same day, on this floor, one of our employees went down, I mean down to the ground, writhing in pain, moaning. And American Medical Response was late. . . . I came in even after the ambulance arrived and the man was still hurting badly and needed to be transported to a hospital." (Video, 2/6/14 Board Meeting, 1:33:58-1:34:53).

At the February 27, 2014 Board meeting, Charles Savoie, a union steward for the Teamsters, spoke during the Citizens Comment portion of the agenda. He quoted Chair Ludlow's comment from the February 6 meeting regarding AMR arriving late when called to respond to a medical emergency involving a County employee. Mr. Savoie shared information that he had obtained from reviewing dispatch records related to the call, and asserted that, because the call involved a person with [REDACTED] it was treated

as a priority 2 call and not subject to the eight-minute response time applicable to priority 1 calls. Therefore, AMR was not late according to Mr. Savoie. He asked Chair Ludlow to apologize for his earlier remarks. (Video, 2/27/14 Board Meeting, 08:31-0:12:13).

Chair Ludlow responded, in relevant part, "I've never seen, or rarely seen, anybody in that kind of agony. . . . I saw a man writhing in pain worse than I've ever seen and I thought the response was late." (Video, 2/27/14 Board Meeting, 0:12:13-0:12:33).

On March 3, 2014, the *Portland Tribune* published an article regarding the exchange between Mr. Savoie and Chair Ludlow during the February 27 business meeting. The article reported that Mr. Savoie, an AMR employee, requested that Chair Ludlow apologize for allegedly "derisive" remarks that he made during the February 6, 2014 meeting in which AMR's contract was discussed. The article quotes Chair Ludlow as saying, "I don't care what the fire department said to you. . . . All I know is that, and I know the tapes and what time you got into the elevator, etcetera – I don't care about non-life threatening – I've never seen, or I've rarely seen, anybody in that kind of agony."

On April 3, 2014, Mr. Anderson ran into Ben Eckstein who remarked that he had seen the *Portland Tribune* article. Mr. Eckstein informed Mr. Anderson that Chair Ludlow had made similar remarks at the January 30 legislative dinner, specifically that he had stated that "he had never seen a grown man scream and cry like that" and that he also stated, referring to Mr. Anderson's medical emergency, "It was all very pathetic."

iii. Mr. Anderson's privacy concerns.

I find that Chair Ludlow's comments did not violate Mr. Anderson's right to privacy. Chair Ludlow described what he observed in the fourth floor hallway of the Public Service Building, a public space within a public building. Even if that area of the building is not frequented by members of the public at large, it is an area over which the County, not Mr. Anderson, maintains control. *Cf. State v. Cromb*, 220 Or. App. 315, 320 (2008) (in assessing whether law enforcement conducted an unreasonable search in a hospital emergency room, the court concluded that, although the defendant was in a curtained area and members of the public were not free to come and go from the ER, the fact that the area was controlled by medical personnel and not those seeking treatment defeated the defendant's argument that he had a reasonable expectation of privacy). Further, Chair Ludlow's description of Mr. Anderson's demeanor differs markedly from situations where an employer shares or gains access to information from an employee's medical records, which an employee would reasonably expect to be known to no one other than himself and his physician, and courts have recognized a constitutionally protected privacy interest. *See, e.g., Doe v. Attorney General of the United States*, 941 F.2d 780, 795 (9th Cir.1991) (expectation that an employee be required to disclose his HIV status implicated a constitutionally protected privacy interest). Chair Ludlow did not mention the specific condition that prompted Mr. Anderson's collapse, nor did he mention Mr. Anderson's name when he mentioned in the incident in the February 6 and February 27 Board meetings.

While I do not find that Chair Ludlow's statements violated Mr. Anderson's constitutional right to privacy, I do find that his inclusion of details regarding Mr. Anderson's

medical emergency in statements made at the legislative dinner reflect a lack of sensitivity to the fact that Mr. Anderson might find it embarrassing to have details regarding his medical emergency shared with an audience of people with whom he works professionally on a day-to-day basis. While I do not doubt that Chair Ludlow made these statements out of concern for Mr. Anderson, he could have simply stated that Mr. Anderson was unable to attend the dinner due to medical issues and wished him a speedy recovery.

C. Allegedly Discriminatory Statements by Chair Ludlow.

Mr. Anderson asserted in his complaint that Chair Ludlow has a history of making sexist, racist and derogatory remarks in front of Government Affairs staff. Mr. Anderson does not allege that Chair Ludlow's remarks were discriminatory towards him, rather that his comments were made about others and are known to Mr. Anderson either because someone reported a comment to him or he heard it himself. He cited five discriminatory remarks of which he was aware:

- During a dinner with Mr. Schmidt and Mr. Lyons on February 11, 2014, Chair Ludlow stated that former Commissioner Ann Lininger was appointed to fill Chris Garrett's house seat because "she does a good job of sticking out her perky titties in people's faces;"
- While in Salem accompanying Chair Ludlow to meetings with legislators during the 2013 legislative session, Chair Ludlow referred to a passing woman as "eye candy" and said "hubba hubba;"
- On another visit to the legislature with Mr. Anderson, Chair Ludlow struck up a conversation with a police officer who was also waiting to see a state legislator. Chair Ludlow asked what jurisdiction the officer was from and they discussed a shooting that had recently occurred there. Chair Ludlow allegedly stated, regarding the suspects, "I bet they were Mexicans;"
- On the day of the Boston marathon bombings, Chair Ludlow told Mr. Anderson that it was ridiculous to suspect domestic terrorists and stated, "I'm sure it was a damn A-rab;"
- In a meeting with Mr. Schmidt shortly after taking office, Chair Ludlow allegedly asked for information regarding Mr. Lyons' and Mr. Anderson's professional backgrounds. After Mr. Schmidt described Mr. Lyons' work experience, Chair Ludlow allegedly responded that it sounded to him like Mr. Lyons was a "greenie," meaning an environmentalist.²

i. Chair Ludlow's response and statements of witnesses.

Although Chair Ludlow did recall having dinner in Salem with Mr. Lyons and Mr. Schmidt on or around February 11, Chair Ludlow denied making any remark about former Commissioner Lininger. He did not recall a situation where he was in Salem with Mr. Anderson and commented on a passing woman's appearance, and denied that he has ever said "eye candy" or "hubba hubba." He noted that he did not see any issue with pointing out

² Mr. Anderson clarified in his interview that, although he states in his complaint that Chair Ludlow's remark was directed at both Mr. Lyons and him, that it was actually his understanding that Chair Ludlow's comment was aimed solely at Mr. Lyons.

a good looking woman. Chair Ludlow recalled speaking with a Forest Grove police officer while at the legislature with Mr. Anderson. The officer was taking a call regarding a shooting that was in progress. Chair Ludlow made a statement to the effect that the suspect was likely a Mexican gang member. He explained that as a former mayor of a city in Washington County, he is aware that Forest Grove has a huge problem with Mexican gangs. The officer did not react with disgust to his comment. Chair Ludlow did not recall discussing the Boston marathon bombing with Mr. Anderson and denied using the term "A-rab." He may have used the term "jihadist" or "Islamist." Chair Ludlow recalled discussing Mr. Lyons' professional background with Mr. Schmidt, but denied referring to Mr. Lyons as a "greenie." Chair Ludlow explained that, in his view, the County's lobbyists are hired to do a job and they try to do a good job whether they personally agree with their client's position or not.

Mr. Schmidt recalled discussing Mr. Lyons' professional background with Chair Ludlow, although he recalls that Mr. Lyons was also present. Chair Ludlow made a comment to the effect of "Oh, you sound like an environmentalist." According to Mr. Schmidt, he then interjected and stated jokingly that he had worked for Mark Hatfield and Gordon Smith so he's a "right wing nut job." Mr. Schmidt confirmed that, at a business dinner with Mr. Lyons and Chair Ludlow, Chair Ludlow made the alleged comment regarding former Commissioner Lininger. He did not object to the remark at the time. From his perspective, the comment reflected a poor sense of humor and was a comment made in confidence in front of staff. Mr. Schmidt believes that, if staff are offended by comments made by Chair Ludlow or other commissioners, they are free to speak up about it. He believes the commissioners would be open to a staff person saying, "I can't believe you just said that."

Chris Lyons stated that he was not present when Chair Ludlow commented about his environmentalist background but Mr. Schmidt reported the comment to him. Chair Ludlow has never made a comment directly to Mr. Lyons about having an environmentalist bent. Mr. Lyons recalled that Chair Ludlow took Mr. Schmidt and him out to dinner in Salem and that during the dinner Chair Ludlow made a remark about Ann Lininger flaunting her breasts. Mr. Lyons found the comment offensive. He believes that if a staff person is aware of an inappropriate remark or discriminatory actions by an elected official, it is particularly difficult to report the conduct. There is a concern that if a staff person makes a complaint about an elected official, you can be fired or fall out of favor with the official, causing the official to rely upon others. Although Mr. Lyons did not personally hear the other remarks alleged, he stated that Mr. Anderson reported Chair Ludlow's alleged remark about the Boston marathon bombing suspect to Mr. Lyons at the time the comment was made (April 2013).

Emily Klepper, Chair Ludlow's policy coordinator, has not heard Chair Ludlow use the phrases he is alleged to have used in the complaint; however, she has heard him make comments about women that have troubled her. She stated that, after a meeting of the Clackamas County Business Alliance, Chair Ludlow commented to her about the low-cut blouse that one of the women attending was wearing and asked how the woman could get away with wearing a blouse like that. She told Chair Ludlow that she did not think it was appropriate for him to talk like that and quickly changed the subject. Ms. Klepper described another example in which she and Chair Ludlow were attending a meeting about road

maintenance with other female County representatives. Chair Ludlow made a remark to the effect of "Looks like I'm the token male in the meeting." She described this comment as "the type of thing that doesn't need to be said but is said anyway."

ii. Findings regarding alleged discriminatory remarks.

I find that there is ample substantiation to conclude that Chair Ludlow made the alleged remark about former Commissioner Lininger. Mr. Schmidt and Mr. Lyons both had a clear recollection of the statement. I was particularly persuaded by Mr. Schmidt's description of the comments because he has no demonstrated motive to lie. Mr. Schmidt stated that he has not viewed any remark that Chair Ludlow has made to be inappropriate. Mr. Schmidt also expressed the perspective that the comment was excusable because it was made in a discussion with staff. His personal attitude is that PGA staff have to work closely with commissioners, which necessitates building relationships with them. In so doing, "you take the good with the bad." If Mr. Schmidt were being untruthful in an effort to support Mr. Anderson's complaint, he presumably would have also confirmed Mr. Anderson's perspective that the comment was offensive.

With respect to the other alleged comments, I find that Chair Ludlow made remarks similar to those described in the complaint even if he did not use the exact verbiage alleged. I also find that Chair Ludlow did not perceive that these other remarks might be interpreted as expressing a discriminatory attitude towards those individuals or groups who were the subject of his remarks. In the case of the environmentalist comment, the remark, even if made as quoted in the complaint, is not discriminatory because environmentalists are not a protected class.

Chair Ludlow described himself as a compassionate individual who does not personally discriminate against others and for whom allegations that he has made discriminatory remarks are highly distressing. Nonetheless, I found the other witnesses I interviewed to be credible in their assertions that they found remarks that he has made inappropriate or offensive. Chair Ludlow does not anticipate that his remarks will cause offense and concludes his assumption is correct because staff are reluctant to speak up to an elected official about the fact that a statement that he has made has offended them.

While none of the alleged remarks are evidence of discriminatory treatment of Mr. Anderson, they do reflect a disconnect between County staff and at least one board member about what type of statements are appropriate in a work setting. Mr. Schmidt's reaction to the statements (i.e. that staff should feel free to object at the time to the elected official and that elected officials will be open to staff's objection) reflects that Mr. Schmidt may be insufficiently sensitive to the fact that County employees may feel less free to complain about the conduct of an elected official than they would be to complain about the conduct of another employee of the County.

D. Alleged Retaliation for Making a Complaint to DES.

In his personal notes and during his interview, Mr. Anderson expressed concern that the Board's removal of Mr. Anderson's presentation from the agenda for the Board's April 28, 2014 study session the same day that the Board was advised of his complaint and the Board's

reported decision to have Dan Chandler, the Board's strategic policy administrator, handle issues surrounding the Board's land use objectives in anticipation of the 2015 legislative session supports a conclusion that the Board is diminishing his job responsibilities in retaliation for his filing a complaint.

Mr. Schmidt explained that Mr. Chandler was previously with the County Counsel's office and was the land use attorney for the County. The Board has asked Mr. Chandler to help develop a plan for what the County's land use ask should be in the next legislative session. According to Mr. Schmidt, once that plan is developed, it should be handed off to Mr. Anderson and Mr. Lyons, as the County's lobbyists, to execute. Mr. Schmidt stated that he has explained to Mr. Anderson and Mr. Lyons that they are not the subject matter experts; they are the legislative experts. Mr. Chandler will focus on this issue for now and, come fall, it is Mr. Schmidt's intention that the proposal will be turned over to the lobbying team.

I find that removal of Mr. Anderson's presentation from the study session, alone, does not constitute an adverse action that would support a claim of retaliation. It has yet to be seen whether Mr. Anderson's job duties will be diminished compared to what they have been during past legislative sessions. According to Mr. Schmidt's statements, there is no current plan to eliminate significant aspects of Mr. Anderson's job.

E. Failure to Follow Through On Diversity Resolution.

During his interview and in his personal notes, Mr. Anderson expressed concern about the fact that his interest in forming an affinity group for LGBT employees of the County has been stymied, contrary to the Board's 2012 Resolution Valuing Diversity. While not in and of itself an adverse action, Mr. Anderson clearly views the fact that he has had difficulty getting a minority employee affinity group off the ground to be evidence supporting his complaints of discriminatory treatment. I inferred that Mr. Anderson perceives that the current Board's apparent disinterest in implementing this resolution is evidence that the current Board tolerates discrimination, or at least that fostering an inclusive work environment and prohibiting discrimination is not a priority for the current Board.

The Resolution Valuing Diversity in Clackamas County provides that County staff is directed to "allow county employees to create affinity groups, on a voluntary basis, so that people can develop camaraderie and get to know one another, as desired within the workplace." A Resolution Valuing Diversity in Clackamas County, ¶ 2(f).

It is not clear to me what obstacles, if any, may be preventing Mr. Anderson from forming an affinity group for LGBT employees. It is also unclear to me what legal effect the prior Board's resolution currently has, particularly in light of the fact that there is now a new Board majority who did not have an opportunity to vote on the resolution in 2012. Assuming that the resolution is binding on the current Board and establishes principles to which the Board must adhere, it would be a violation of that resolution for County staff not to allow Mr. Anderson to form an LGBT affinity group. Mr. Anderson objected to the County's requirement that participation in such a group be on the employees' personal time rather than on paid County time. The resolution provides only that County staff must allow participation in affinity groups and does not require that the County pay County staff for time spent participating in such groups. County counsel may wish to evaluate whether, if such groups

are formed, whether time that employees spend participating should be paid time under federal and state wage and hour laws.

Please let me know if you have any questions or if you require any other information related to this investigation.



NANCY DRURY
DIRECTOR

DEPARTMENT OF EMPLOYEE SERVICES

PUBLIC SERVICES BUILDING
2051 KAEN ROAD | OREGON CITY, OR 97045

May 29, 2014

Jared Anderson


SUBJECT: Conclusion of Investigation

Dear Jared:

The Department of Employee Services, through County Counsel, has coordinated and completed the investigation of the complaint submitted by you on April 22, 2014, regarding Chair John Ludlow and Commissioner Tootie Smith.

I would like to arrange a time to discuss the findings in Dana Sullivan's investigation. Briefly, Ms. Sullivan concluded that some inappropriate conduct occurred, including comments about protected categories of individuals, but did not find supporting evidence that unlawful discrimination or harassment occurred. The County has taken and will continue to take appropriate measures to provide a work environment that is free from unlawful discrimination and harassment. We will continue to work with you and others in the County to provide such a work environment.

At the close of any investigation we remind the parties that the County will not tolerate any retaliation by a respondent, the complainant, the department or other parties involved toward anyone participating in this process. Oregon law and County policy prohibit retaliatory actions against any individual filling a complaint or otherwise participating in the complaint process. A charge of retaliation constitutes an actionable complaint. Report any conduct that you suspect is retaliatory to myself or Mark Stotik in DES, your supervisor, County Counsel, a Deputy County Administrator or the County Administrator immediately.

Please feel free to contact me at (503) 655-8812 if you have questions.

Sincerely,



Nancy Drury, DES Director

CC DES complaint file
Kathleen Rastetter, Assistant County Counsel
Gary Schmidt, PGA Director
Don Krupp, County Administrator



NANCY DRURY
DIRECTOR

DEPARTMENT OF EMPLOYEE SERVICES

PUBLIC SERVICES BUILDING
2051 KAEN ROAD | OREGON CITY, OR 97045

May 29, 2014

Commissioner Tootie Smith
29429 S Beaver Creek Road
Mulino, OR 97042

Dear Commissioner Smith:

The Department of Employee Services, through County Counsel, has coordinated and completed the investigation of the complaint submitted by Jared Anderson, alleging discrimination and hostile work environment.

We will arrange a time to discuss the findings in Dana Sullivan's investigation. Briefly, Ms. Sullivan did not find sufficient evidence to show that your comments subjected Mr. Anderson to discrimination or a hostile work environment based on his age, sexual orientation or political party.

The County has taken and will continue to take appropriate measures to provide a work environment that is free from unlawful discrimination and harassment. We will continue to work with you and others in the County to provide such a work environment for everyone.

At the close of any investigation we remind the parties that the County will not tolerate retaliation on the part of the respondent, the complainant, the department or other parties involved toward anyone participating in this process. Oregon law and County policy prohibit retaliatory actions against any individual filing a complaint or otherwise participating in the complaint process. A charge of retaliation constitutes an actionable complaint. Action that is retaliatory in nature may be a violation of the above, and the County will not defend or indemnify willful violations.

Please feel free to contact me at (503) 655-8812 if you have questions.

Sincerely,


Nancy Drury, DES Director

CC: Kathleen Rastetter, Assistant County Counsel
Don Krupp, County Administrator



NANCY DRURY
DIRECTOR

DEPARTMENT OF EMPLOYEE SERVICES

PUBLIC SERVICES BUILDING
2051 KAEN ROAD | OREGON CITY, OR 97045

June 2, 2014

Chair John Ludlow
29173 SW Courtside Drive
Wilsonville, OR 97070

Dear Chair Ludlow:

The Department of Employee Services, through County Counsel, has coordinated and completed the investigation of the complaint submitted by Jared Anderson, alleging a violation of privacy and inappropriate remarks within the workplace.

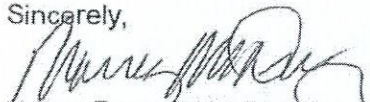
We will arrange a time to discuss the findings in Dana Sullivan's investigation. Briefly, Ms. Sullivan did not find sufficient evidence to show that your comments violated Mr. Anderson's right to privacy by publicly commenting on a medical emergency. She did find that you made some comments, but found that the comments did not rise to the level of a hostile work environment.

The County has taken and will continue to take appropriate measures to provide a work environment that is free from unlawful discrimination and harassment. We will continue to work with you and others in the County to provide such a work environment for everyone.

At the close of any investigation we remind the parties that the County will not tolerate retaliation on the part of the respondent, the complainant, the department or other parties involved toward anyone participating in this process. Oregon law and County policy prohibit retaliatory actions against any individual filing a complaint or otherwise participating in the complaint process. A charge of retaliation constitutes an actionable complaint. Action that is retaliatory in nature may be a violation of the above, and the County will not defend or indemnify willful violations.

Please feel free to contact me at (503) 655-8812 if you have questions.

Sincerely,



Nancy Drury, DES Director

CC: Kathleen Rastetter, Assistant County Counsel
Don Krupp, County Administrator

CLACKAMAS COUNTY COMPLAINT FORM

Date: 04/21/2014 Your Department: Public & Govt. Affairs
Employee ID # [REDACTED] Sex: M Race: Caucasian
Your name: Jared P. Anderson
Address: [REDACTED]
Home Phone: [REDACTED] Work Phone: 503-742-5923

Name of person(s) that you claim is (are) discriminating against you:
Trotter Smith, John Ludlow
Their job title and department: Commissioner, Clackamas County
Board of Commissioners

Date(s) of incident: Please see attached
Basis of complaint: race, color, age, religion, sex, national origin, disability, other
(please specify) ||

Statement of the facts that you believe support your claim that you have been
discriminated against: ||

Jared P. Anderson 04/21/14 MCS 4/26/14
Complainant's Signature Date Received by

SUBMIT YOUR COMPLAINT TO:
NANCY DRURY, DIRECTOR
DEPARTMENT OF EMPLOYEE SERVICES
2051 KAEN ROAD, 3RD FLOOR
OREGON CITY, OR 97045
503-655-8812

AUTHORIZATION TO DISCLOSE IDENTITY FORM

The Intake and Review of a Complaint requires the County to seek written permission for disclosure of the complainant's identity during the investigation process, if the employee alleges a violation of state or federal law (per ORS 659A.218). If permission is not given, the complainant is advised that the refusal to allow disclosure of their identity may hamper or prevent the ability of the County to conduct a complete and thorough investigation.

APPROVAL

Jaed P. Aron
Signature

04/21/14
Date

My signature signifies I give my permission to disclose my identity as necessary to move forward with the investigative process. Confidentiality will be provided to the fullest extent that allows a complete and thorough investigation.

RETURN THE SIGNED FORM TO:

**CLACKAMAS COUNTY, PUBLIC SERVICES BUILDING
DEPARTMENT OF EMPLOYEE SERVICES
2051 KAEN ROAD
OREGON CITY, OR 97045**

ATTN: NANCY DRURY, DIRECTOR

Jared P. Anderson
Public & Government Affairs Department
Employee ID#: [REDACTED]
Home Phone: [REDACTED]

I. AGE DISCRIMINATION/HARRASMENT – COMMISSIONER TOOTIE SMITH

In February 2014, Commissioner Tootie Smith began making damaging comments that call into question my and Chris Lyon's experience and professional credibility. She has stated publically and behind-the-scenes that the County lacks experienced and capable staff in Salem. She is also currently pushing for the County to hire an outside contract lobbyist to handle a portion of the County's state lobbying activities. She initiated this push publically at the 02/25/14 BCC study session, stating that she wants to "present a strategy to the Board" on how to handle state legislative issues. This strategy is to hire a contract lobbyist to provide full-time support to the Board. Gary informed Chris and me around that date that he'd had private conversations with Commissioner Smith, wherein she expressed displeasure with Chris and my performance. Gary mentioned specifically that Commissioner Smith thinks we're inexperienced.

During Gary Schmidt's 03/11/14 appearance before the Board regarding legislative issues, Commissioner Smith once again made statements regarding the need for the County to hire a state contract lobbyist, claiming that current staff doesn't have the necessary skills. Commissioner Smith said: "I almost am to the point of having somebody on retainer who is down there all the time - not that these guys [referring to Chris Lyons and me] aren't down there all the time, but a person who has had lots of experience, they can read, you know, a bill note that's there, they know what the flavor of the thing, they know all the behind the scenes characters and what they're doing, and I think we can benefit from that, not just on land use but a lot of things."

Later that afternoon, Gary came into my and Chris' office to discuss his session with the Board. Chair Ludlow passed in front of my office at the start of the conversation. Gary asked Chair Ludlow to enter the office and said: "John, please come in and tell these guys what a great job they're doing since Commissioner Smith continues to badmouth them in public." Chair Ludlow came in, sat down, and said: "Regardless of what's been said about your age, I think you two are doing a fantastic job." He went on to say that Commissioner Smith has an anger management problem and frequently fails to control her emotions.

On 04/16/14, Gary, Chris, and I met with Chair Ludlow and Emily Klepper in the Chair's office to discuss his potential priorities for the 2015 legislative session. At the end of the conversation Chair Ludlow said to Chris and me: "Gentlemen, let me lay something out on the table for you. There are people along this hall who have issues with your age. They say that given your age you are too inexperienced for the job. And people are talking inside and outside the organization." Gary interrupted

and said: "Yes, but those comments are originating from this hall, Commissioner, not from outside." Chair Ludlow said: "Regardless, the comments are circulating and I think Jared and Chris have a right to know since it's happening behind their backs."

Chair Ludlow's remarks indicate that Commissioner Smith is actively discriminating against Chris Lyons and me because of our age. Motivated by her personal distaste for our age, Commissioner Smith is making damaging comments about our professional credibility and is pushing for an action (hire a state contract lobbyist) that will significantly change the conditions and requirements of my employment with Clackamas County. Gary Schmidt has agreed to make a formal budget request for a state contract lobbyist.

II. OTHER ISSUES – COMMISSIONER TOOTIE SMITH

I believe that Commissioner Smith's actions against me – as outlined above – are not exclusively motivated by age, but are also motivated by additional factors:

Sexual Orientation: On 04/16/14, Commissioner Tootie Smith's recent efforts to call my professional credibility into question began shortly after a "run in" I had with her on 01/29/14. A few days after my return [REDACTED] I appeared before the Board on 01/14/14 to discuss the County's annual legislative agenda. Chair Ludlow congratulated me on becoming a parent. On 01/29/14, I helped staff the joint Clackamas County/Multnomah County Board meeting to appoint a legislator to a house district seat. I greeted attendees in the lobby and opened the door for Commissioner Smith. As she entered the building, she said to me: "I want to see a picture of your baby!" I pulled out my cell phone and showed her a picture of my newly adopted, 4-year-old son, whose picture is the "wallpaper" on phone. She grabbed my cell phone, looked at the picture, and looked back at me very confused and said: "Wait a minute?" I suspected from her response that she was expecting to see a picture of a baby. I responded: "That's Anthony, he's four, and my partner Joe and I just adopted him from foster care." She immediately handed me back the phone with a look of disgust and walked away without saying a word.

It was following that run-in that Commissioner Smith began to make untruthful remarks about my experience/performance and began advocating for a contract lobbyist. Unfortunately, as Director of the Oregon Family Council, Commissioner Smith actively lobbied against policies that promote the equal protection of gays, lesbians and other sexual minorities (GLBT). Her homophobia is well established, and her background makes clear that she objects to structures, laws and policies that protect the rights of those within the GLBT community. Her public statements regarding gays, lesbians and other sexual minorities make evident that she has a fervent homophobic mentality from which county employees need protection.

Political Party Affiliation: Gary Schmidt, Chris Lyons, and I met with Commissioner Smith and Kimberlee DeSantis to discuss her potential priorities for the 2015 legislative session. Gary began by asking Commissioner Smith what her priorities are for 2015. She got visibly angry and yelled: "I'll tell you what my priority is. It's for you guys [repeatedly pointing her finger at Chris and me] to go down to Salem and get those damn Democrats to stop acting like idiots. Oh, wait a minute, you all are Democrats, right?" With a very angry tone, and staring right at Chris and me, she proceeded to ask repeatedly: Well? Are you a democrat? Are you a democrat?" Gary interrupted and said: "Tootie, I'm not a Democrat. But that's irrelevant." I was shocked by both her question and visible anger and said: "Commissioner, we are here to represent the Board's priorities, not our own. That's the nature of our profession." She wasn't happy with that response and told Chris and I that we need to "pull ourselves up by the bootstraps and stop accepting the status quo in Salem." She also said: "I'm very passionate about my beliefs. And I don't think you share those beliefs because you always have your poker faces on when I talk."

It is evident from this conversation that Commissioner Smith thinks Chris Lyons and I are unfit to advance the Board's legislative priorities because she perceives us to be members of the Democratic Party. Although I have never discussed my personal political affiliation with any member of the Board, it is within my rights as a public employee to express my personal view on policy matters, if I so choose. No County employee should feel threatened or have their work conditions changed due to their personal political affiliation.

III. VIOLATION OF PRIVACY – CHAIR JOHN LUDLOW

On 01/30/14, I experienced [REDACTED] at work and collapsed in the hallway outside my office. My coworkers in PGA called 9-1-1 and the county's ambulance service provider – AMR – responded and transported me to the hospital. That evening, the County hosted its annual legislative dinner, which I coordinate along with Chris Lyons. The 50+ attendees included commissioners, department directors, state legislators and their staff, and congressional field representatives.

On 01/31/14, I received an email from Ben Eckstein, Clackamas County Field Representative for Congressman Kurt Schrader, stating that he heard about my incident. I was immediately concerned that my personal medical information may have been shared with attendees at the dinner. Gary Schmidt called that afternoon to check in on my condition. Before I could ask what medical information may have been shared, Gary said that Chair Ludlow, in his opening remarks, introduced the Government Affairs team. When it came to introduce me, Chair Ludlow said I was unable to be there and asked the crowd to give me a round of applause for my work. Given this remark, I no longer assumed details regarding my condition were shared formally with the crowd.

I returned to work on 02/10/14. On 02/12/14, Chair Ludlow visited my office and expressed displeasure with AMR's response to my incident. I informed him twice that I was very happy with the paramedics and their response, but he insisted that they took too

long to respond. He then handed me a CD and directed me to give it to my coworker, Chris Lyons. The CD had a post-it note attached that says 'PSB Lobby 01/30/14.' I asked Chair Ludlow if this CD is a recording of the 9-1-1 call/response from my incident. He responded: "Yes, just give it to Chris," and walks away.

I immediately called Chris, who was not in the office, and asked him why Chair Ludlow is giving him a CD that documents my medical incident. Chris stated that he and Gary had dinner with Chair Ludlow on 02/11/14 after the Chair testified at the Legislature regarding the Columbia River Crossing project. According to Chris, Chair Ludlow was looking into my incident because it was a good illustration of AMR's poor performance.

That day I spoke to Gary Schmidt regarding the CD and his dinner discussion with Chair Ludlow. I told Gary that I was concerned the Chair may use my incident to justify his decision to reject AMR's contract (i.e. that AMR is a poor-performing company). I expressed my objection to my personal medical incident being used by the Chair for political purposes. Gary agreed and told me not to worry. He said he would talk to the Chair and make certain it doesn't happen.

On 03/04/14, I read an online article in the Portland Tribune regarding my incident. The article made clear that Chair Ludlow discussed my incident during televised Business Meetings on 02/06/14 and 02/27/14. It also made clear that Chair Ludlow discussed my incident publically as early as 02/06/14 – nearly a week before my conversation with Gary, wherein I asked him to ensure that details of my incident remain private. For example, Chair Ludlow recounted a discussion he had with an AMR paramedic at the 02/06/14 Business Meeting. The paramedic told the Chair that he would provide him with outstanding service if the Chair ever needed medical attention. The Chair proceeded by saying: "That very day, on this floor, one of our employees went down. And I mean down to the ground. Writhing in pain. Moaning. And AMR was late. We have the tapes. We know everything about that and how long it took them to get here ... I came in even after the ambulance arrived and the man was still hurting badly and needed to be transported to a hospital. So I hope that good service that was promised to me continues, and I pray to God that I don't have a heart attack."

I called Chris and informed him of the article. During that conversation, I mentioned Ben Eckstein's email from 01/31/14 and asked if he knew how Ben found out about my incident. Chris told me that Chair Ludlow, in his opening remarks, recounted for the crowd all of the details of my incident. According to Chris, the Chair stated that I collapsed because of [REDACTED] and I was hauled away by ambulance. The Chair also stated that he saw the incident happen and that he's never seen a grown man moan and scream like that.

After the phone call with Chris, I spoke to Gary. I told him that I read an article about my incident in the Portland Tribune. He stated that he knew the Chair intended to share the incident publically; he spoke to the Chair and asked him not to share the incident since it would be "humiliating" and "embarrassing" to me; and John agreed not to share the information. However, according to Gary, the Chair went back on his word and

discussed the incident regardless. I told Gary I was upset to find out from the newspaper that my incident was being discussed publicly, especially since I was given reassurance that it would not happen. I then asked Gary what, if anything, was said to attendees of the legislative dinner that evening. He reiterated his original story – that Chair Ludlow stated I couldn't be there and that everyone gave me a round of applause. I told him that I heard differently from several people – that they told me the Chair went into great detail about my incident during his opening remarks. In response, Gary stated that he wasn't sure what was said that evening – he was very stressed and wasn't paying close attention. He then said, "If you have an issue, you can talk to John directly," and left the office for the rest of the week.

On 04/03/14, I staffed the Clackamas County Coordinating Committee (C4) meeting. I ran into Ben Eckstein who I hadn't seen since my incident. He began the conversation by stating that he saw the Portland Tribune article about my medical incident. He said that Chair Ludlow told the entire crowd at the legislative dinner about my incident, going into great detail during his opening remarks. He said that he remembers "cringing" twice: First when the Chair stated "I've never seen a grown man scream and cry like that," and second when the Chair ended his remarks about my incident by saying "it was all very pathetic."

Employers have an obligation to keep the health-related information of employees confidential and to treat such information with great care. Chair John Ludlow violated my reasonable expectation of privacy by both sharing my personal medical information/history with numerous outside parties and drawing attention to my incident to achieve his personal political goals.

IV. OTHER ISSUES – CHAIR JOHN LUDLOW

Chair Ludlow has a history of making sexist, racist and derogatory remarks in front of Government Affairs staff. For example, shortly after Chair Ludlow was sworn into office, he met with Gary Schmidt and asked for information on Chris Lyons and me. Gary told us that after sharing our work history, Chair Ludlow said: "They sound like greenies (i.e. environmentalists)." During the 2013 legislative session, I often accompanied Chair Ludlow to meetings with state legislators. During one-on-one conversations in the Capitol, he referred to a passing woman as "eye candy" and said "hubba hubba." On the day of the Boston Marathon bombings, he told me that it was ridiculous to suspect domestic terrorists. In his words, "I'm sure it was a damn Arab." On another visit, Chair Ludlow and I were waiting in the office of a state legislator when the Chair struck up a conversation with a police officer also waiting to meet the legislator. Chair Ludlow asked which jurisdiction he was with [I believe it was Forest Grove] and mentioned a shooting that had recently occurred there. "Did you catch the guys?" Chair Ludlow asked. "Yes," the officer responded. Chair Ludlow then said, "I bet they were Mexicans." The officer looked a bit stunned and walked away. At a dinner with Gary, Chris, and Chair Ludlow on 02/11/14, the Chair stated that former-Commissioner Ann Lininger was appointed to fill Chris Garrett's house seat because "she does a good job of sticking out her perky titties in people's faces." Comments such as

these create a very hostile work environment for County employees and are not in line with public-sector values, including the County's stated goals of diversity and inclusion.

Eric C. Winters
Attorney at Law

TELEPHONE 503-454-0828
FAX 866-867-5451

30710 SW Magnolia Avenue
Wilsonville, Oregon 97070

Tax ID #541069933

Eric@ericwinters.com

INVOICE AND BILLING STATEMENT

Clackamas County Chair John Ludlow

Statement date: 7/2/14

RE: Outside counsel assignment - Jared Anderson employment complaint

PROFESSIONAL SERVICES PROVIDED

Legal Fees

5-6-14	Call fr. John Ludlow re: assistance in assignment of outside counsel, rev. complaint, assemble list, call to D. Angeli, Prep for meeting	2.5 hrs (\$175)
5-7-14	Travel to Clackamas Co. offices (38 mi rndtrp)	0.8 hr (\$75)
5-7-14	Conference w. John, Angeli and B. Souede	1.4 hrs (\$175)
5-8-14	Angeli call re: conflict, call to John, multiple calls re: counsel interviews	1.8 hrs (\$175)
5-9-14	Travel to R. Hoebet's office (43mi rndtrp)	1.0 hr (\$75)
5-9-14	Conference w. W. Boise, Hoebet and John re: assignment of counsel	0.9 hr (\$175)
5-13-14	Call fr. John	0.4 hr (No Charge)
5-16-14	Review investigator summary interview w. John	0.3 hr (No Charge)
5-20-14	Review Ludlow interview notes	0.2 hr (No Charge)
5-21-14	Review Hoebet redline of summary	0.2 hr (No Charge)

5-28-14	Review public records request, emails w. John	0.4 hr (No Charge)
5-29-14	Call fr. John requesting my assignment as counsel, Emails fr. John, call to S. Ruckwardt	0.8 hr (\$175)
5-30-14	Call to John, rev. S. Madkour email re: release of doc's process	0.5 hr (\$175)
6-2-14	Travel to Clackamas Co. offices (38 mi rndtrp)	0.8 hr (\$75)
6-2-14	Meet w. John; meeting with N. Drury, K. Rastetter and John; Confer w. Madkour, partial review of investigative documents, meet w. John	2.2 hrs (\$175)
6-2-14	Legal research re: public records, call to John, Call to Ruckwardt, memo to John	1.5 hrs (\$175)
6-3-14	Travel to Clackamas Co. offices (38 mi rndtrp)	0.8 hr (\$75)
6-3-14	Meet w. John, meeting with Madkour, finish review of investigative reports	2.0 hrs (\$175)
6-3-14	Meet w. John, T. Smith and Ruckwardt; rev. caselaw, meet w. Madkour and Ruckwardt, meet w. John	2.3 hrs (\$175)
6-3-14	Call fr. John, memo fr. Madkour, call to Ruckwardt, call to John	1.4 hrs (\$175)
6-4-14	Memo to John, call to Ruckwardt, email fr. Ludlow, review doc's to be released, memo's Ruckwardt	1.8 hrs (\$175)
6-6-14	Review media coverage, memo to John	0.4hr (No Charge)
6-11-14	Review media coverage, call to John	0.8hr (No Charge)

Subtotal fees and expenses

\$3342.50	19.1 hrs legal work billed @ \$175/hr
\$ 255.00	3.4 hrs of travel billed @ \$75/hr
\$ 0.00	2.7 hrs unbilled client communications, materials review
\$ 78.50	157 miles billed @ \$0.50/mi

TOTAL FEES AND EXPENSES

\$3676.00

**Please remit payment to: Eric C. Winters
30710 SW Magnolia Avenue
Wilsonville, Oregon 97070**