IN THE SUPREME COURT OF THE STATE OF OREGON

MULTNOMAH COUNTY SHERIFF'S OFFICE,	)	Oregon Bureau of Labor and Industries No. 0144
Petitioner on Review,	)	CA No. A157146
v.	)	Supreme Court No. S064109
ROD EDWARDS and BUREAU , OF LABOR AND INDUSTRIES,	)	
Respondents.	)	

BRIEF OF *AMICUS CURIAE* OREGON TRIAL LAWYERS ASSOCIATION

On Review of the decision of the Court of Appeals affirming a Final Order of the Bureau of Labor and Industries, Brad Avakian, Commissioner

Decision filed: 13 April, 2016
Affirmed,
Before: Before Sercombe, Presiding Judge, Tookey, Judge, and DeHoog, Judge

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BRIEF OF *AMICUS CURIAE*
OREGON TRIAL LAWYERS ASSOCIATION

I. STATEMENT OF INTEREST

The Oregon Trial Lawyers Association ("OTLA") is a statewide organization committed to the principles of trial by jury and a fair and efficient civil justice system. OTLA consists of approximately 900 attorneys and 400 other professionals who represent plaintiffs or claimants in personal injury, civil rights, consumer, employment, workers compensation and business tort litigation.

OTLA's members represent claimants in proceedings alleging unlawful employment practices before BOLI, such as that presented before the Court in this case. OTLA has a vital interest in the correct interpretation of the Oregon employment statutes and in ensuring broad access to justice, including adequate remedies, for its clients. Thus, OTLA has a direct interest in the proper interpretation of ORS 659A.850 – a question that is dispositive of one of the issues presented herein – and consequently, on this issue, *amicus curiae* is aligned with Respondents.

OTLA has filed, contemporaneously with this brief, a motion for leave to file this *amicus curiae* brief. No party or party's counsel authored this brief in

whole or in part, and no portion of this brief was financed by any party or any person associated with the parties – other than *amicus auriae,* its members, or its Counsel.

II. SUMMARY OF ARGUMENT

A cease and desist order issued under ORS 659A.850 may include an award of non-economic damages. The language of ORS 659A.850(4)(a)(B) ("Eliminate the effects of the unlawful practice that the respondent is found to have engaged in") and (C) ("Protect the rights of the complainant and other persons similarly situated") has been held to authorize such an award since at least 1971. The 2007 amendment of the statute, to expressly include "an award of actual damages suffered by the complainant" as one way to eliminate the effects of the unlawful practice, neither limited nor expanded BOLI's authority. In this regard, the amendment simply clarified that an award of actual damages, which, in the present case includes non-economic damages, is expressly authorized.

III. ARGUMENT

A. Introduction

The Court of Appeals determined that any asserted error regarding the authority of BOLI to award emotional distress damages was unpreserved and consequently the court declined to exercise its discretion to consider the

unpreserved error. *Multnomah Co. Sheriff's Office v. Edwards*, 277 Or. App. 540, 561-62, 373 P.3d 1099 (2016). OTLA agrees with the court's decision.

Furthermore, contrary to Petitioner's assertion, the award of non-economic damages was not a jurisdictional defect which can be raised for the first time before this Court. As will be elaborated, the commissioner had the authority to make findings of fact and conclusions of law, and, as the case may be, to either dismiss the complaint or, as here, issue a cease and desist order that included an award of non-economic damages. ORS 659A.850(1)-(4). The commissioner did precisely that. Even if the inclusion of non-economic damages as a component of the award was erroneous – and, as will be discussed below, there was nothing erroneous about it – that would merely have been an error of law, not a jurisdictional defect. *See School Dist. v. Nilsen*, 262 Or. 559, 499 P.2d 1309 (1972): "If the judicial officer has the authority to make the inquiry, he has the power to be wrong. An error of law, no matter how egregious, is not jurisdictional."

One of the issues identified by the Court in its grant of the Petition for Review was whether BOLI exceeded its authority by awarding emotional distress damages to Respondent Multnomah County Sheriff's Deputy Edwards. 360 Or. 26 (2016). OTLA submits the following in the event that this Court considers the merits of that question.

B. A cease and desist order issued under ORS 659A.850(4) may include an award of non-economic damages

To answer the Court's question, in order to eliminate the effects of unlawful practices, to protect the rights of the complainant and others and generally to eliminate and prevent unlawful practices, BOLI, upon a finding of an unlawful employment practice, has the authority to award, as part of a cease and desist order issued pursuant to ORS 659A.850, non-monetary damages as well as economic damages.[1]

BOLI's authority is conferred by ORS 659A.850(4), which relevantly provides:

> (4) After a hearing under this section, the commissioner shall issue an appropriate cease and desist order against any respondent found to have engaged in any unlawful practice alleged in the complaint. The order must be signed by the commissioner and must take into account the need to supervise compliance with the terms of order. The order may require that the respondent:
>
> > (a) Perform an act or series of acts designated in the order that are reasonably calculated to:
> >
> > (A) Carry out the purposes of this chapter;
> >
> > (B) Eliminate the effects of the unlawful practice that the respondent is found to have engaged in, including but not limited to paying an award of actual

[1] As discussed below, the "actual damages" language, added by amendment in 2007, neither limits nor expands BOLI's authority to award non-economic damages.

> damages suffered by the complainant and complying with injunctive or other equitable relief; and
>
> (C) Protect the rights of the complainant and other persons similarly situated[.]

Central to the analysis is the meaning of subsection (B), which presents a matter of statutory construction, and is determined in accordance with the methods established by ORS 174.020,[2] *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 859 P.2d 1143 (1993), and *State v. Gaines*, 346 Or. 160, 206 P.3d 1042 (2009).

The overriding objective in interpreting a statute is to ascertain what the legislature intended it to mean. ORS 174.010;[3] *PGE*, 317 Or. at 610. The first

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[2] **ORS 174.020 Legislative intent; general and particular provisions; consideration of legislative history.** (1)(a) In the construction of a statute, a court shall pursue the intention of the legislature if possible.

(b) To assist a court in its construction of a statute, a party may offer the legislative history of the statute.

(2) When a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent.

(3) A court may limit its consideration of legislative history to the information that the parties provide to the court. A court shall give the weight to the legislative history that the court considers to be appropriate.

[3] **ORS 174.010 General rule for construction of statutes**. In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.

step of the analysis is to examine the text, context, and any legislative history the court deems appropriate. *Gaines*, 346 Or. at 171-172. "Text and context remain primary, and must be given primary weight in the analysis." *Id*. at 171.

Context, at the first level of analysis, includes case law interpreting those statutes. *Gaston v. Parsons*, 318 Or. 247, 252, 864 P.2d 1319 (1994); *Mastriano v. Board of Parole*, 342 Or. 684, 693, 159 P3d 1151 (2007) ("[W]e generally presume that the legislature enacts statutes in light of existing judicial decisions that have a direct bearing on those statutes."); *State v. Cloutier*, 351 Or. 68, 100, 261 P.3d 1234 (2011); *Moro v. State of Oregon*, 354 Or. 657, 665-66, 320 P.3d 539 (2014) ("In interpreting statutes, this court presumes that the legislature is aware of existing law and this court's interpretation of that law."). The historical context of the legislation is also significant. *See State v. Pipkin*, 354 Or. 513, 526, 316 P.3d 255 (2013) ("[W]e do not interpret text in isolation; we also consider the historical context against which that text was enacted.").

Consideration of legislative history is also a part of the first level analysis. *Gaines*, 346 Or. at 171-172. Nonetheless,

> "there is no more persuasive evidence of the intent of the legislature than ''the words by which the legislature undertook to give expression to its wishes.'' *State ex rel Cox v. Wilson*, 277 Or. 747, 750, 562 P.2d 172 (1977) (*quoting U. S. v. American Trucking Assn's*., 310 U.S. 534, 542-44, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940)). Only the text of a statute receives the consideration and approval of a majority of the members of the legislature, as

required to have the effect of law. Or. Const, Art IV, § 25."

Id. at 171. "While legislative history is not dispositive, it may be helpful in ascertaining the legislative purpose." *Id.*, at 171-73. Thus, although ORS 174.020 obligates the court to consider proffered legislative history for whatever it might be worth, "what it is worth is for the court to decide. When the text of a statute is truly capable of only one meaning, no weight can be given to legislative history that suggests – or even confirms – that legislators intended something different." *Id*. at 173.

Returning to the statute, Respondent Edwards filed a complaint under ORS 659A.820, alleging an unlawful employment practice, specifically, a violation of ORS 408.230, which is defined as an "unlawful employment practice" by ORS 408.230(6). *See* ORS 408.230(7) (directing such complaints to be filed in accordance with ORS 659A.820). A finding of substantial evidence was made. ORS 659A.835. The matter was not resolved and formal charges were filed. ORS 659A.845. There is no dispute that the hearing below was duly conducted pursuant to ORS 659A.850, which provides for the contested case hearing on those formal charges, review of which is pending herein.

ORS 659A.850, by its own terms, applies to "[*a*]*ll* proceedings before the Commissioner of the Bureau of Labor and Industries under this section."

(emphasis added). Subsection (4), which is the sticking point, requires the commissioner to issue a cease and desist order against *any* employer found to have engaged in *any* unlawful practice.[4] *See* ORS 659A.001(11), (12) ("unlawful employment practices" is a subset of "unlawful practices"). Subsection (4) is not limited to *some* unlawful practices or even the most egregious unlawful practices, but applies to *all* unlawful practices, including the instant violation of ORS 408.230.

ORS 659A.850(4) broadly constrains the content of the cease and desist order, permitting the commissioner to require that the employer:

> (a) Perform an act or series of acts designated in the order that are reasonably calculated to:
>
> > (A) Carry out the purposes of this chapter;
> >
> > (B) *Eliminate the effects of the unlawful practice that the respondent is found to have engaged in, including but not limited to paying an award of actual damages suffered by the complainant* and complying with injunctive or other equitable relief; and
> >
> > (C) *Protect the rights of the complainant and other persons similarly situated*[.]

(emphasis added). The question raised by Petitioner – for the first time on

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[4] any: 1 : one indifferently out of more than two : one or some indiscriminately of whatever kind * * * b : one, no matter what one : EVERY — used as a function word especially in assertions and denials to indicate one that is selected without restriction or limitation of choice. *Webster's Third New Int'l Dictionary*, 97 (unabridged ed. 2002).

appeal – is whether the order may include an award of non-economic damages. The short answer is yes.

The text of the statute clearly points to that conclusion: if a complainant suffers non-economic harm as an effect of the unlawful practice, the statute authorizes BOLI to award damages that are reasonably calculated to eliminate that effect. *See also infra* (discussion of "actual damages,"). Some context is helpful by way of explication.

ORS 659A.800(1) provides the starting point: "The Bureau of Labor and Industries may take *all steps necessary to eliminate and prevent unlawful practices*." (emphasis added). Unlike the distinctions found in ORS 659A.885, relating to civil actions,[5] the legislature did not distinguish among the administrative remedies available for the various kinds of unlawful practice, but broadly granted authority to BOLI to take *all* steps it deemed reasonably

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[5] ORS 659A.885 provides for a private right of civil action for the enumerated unlawful practices, in which the court can order injunctive relief and any other appropriate equitable relief, including back pay. The statute further provides that for some of those practices, primarily those involving discrimination of one sort or another – and not including ORS 408.230 – the court may also award compensatory and punitive damages. The legislature has had several opportunities to somehow link the remedial limitations ORS 659A.885, which apply only to civil actions, with the facially broader range of remedies available in the administrative context in ORS 659A.850. The legislature has declined to do so, and, one must suppose, by design. *See PGE*, 317 Or. at 614 ("The legislature knows how to include qualifying language in a statute when it wants to do so.")

calculated to both eliminate and prevent unlawful practices. Consistently with the historical context of the statute, non-economic damages are an appropriate step to take in fashioning a remedial award under ORS 659A.850(4).

It has long been understood by the courts that the BOLI Commissioner, as an incident of the authority to issue a cease and desist order after a hearing, has had the authority to award damages to a claimant who has been aggrieved by an unlawful employment practice. This was true under ORS 659.010 and 659.060, the predecessors to the current statute, as well as under the current statute, ORS 659A.850.

Like the current statute, ORS 659.060 provided for a contested case hearing in the event that a complaint could not be resolved otherwise. The commissioner was then required to issue an appropriate order.

> (3) After considering all the evidence, the commissioner shall cause to be issued findings of facts, and conclusions of law. The commissioner shall also issue an order dismissing the charge and complaint against any respondent not found to have engaged in any unlawful practice charged and an appropriate cease and desist order against any respondent found to have engaged in any unlawful practice charged.

ORS 659.010(3). The nature of the cease and desist order was described by ORS 659.010, which provided, in relevant part:

> (2) "Cease and desist order" means an order signed by the commissioner, taking into account the subject matter of the complaint and the need to supervise compliance with the terms of any specific order issued to eliminate the effects of any unlawful

> practice found, addressed to a respondent requiring the respondent to:
>
> (a) Perform an act or series of acts designated therein and reasonably calculated to carry out the purposes of ORS 30.670 to 30.685, 659.010 to 659.110 and 659.400 to 659.545, *eliminate the effects of an unlawful practice found, and protect the rights of the complainant and other persons similarly situated*[.]

(emphasis added). While damages as such were not specified, it had been invariably held that monetary damages – including non-economic damages – were an appropriate remedy to be provided in a cease and desist order upon fing an unlawful practice under the statutory language. In *Williams v. Joyce*, 4 Or. App. 482, 504, 479 P.2d 513 (1971), for example, the court, affirming the commissioner's order under former ORS 659.010, reasoned that the award of damages to compensate for a victim's humiliation was appropriate as being reasonably calculated to *eliminate the effects* of discrimination. Similarly, in *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or. App. 253, 592 P.2d 564 (1979), an award of damages to compensate for a victim's humiliation was deemed by the court to have been reasonably calculated *to eliminate the effects* of racial discrimination, and was therefore authorized under former ORS 659.010, and .060. *Gaudry v. Bureau of Labor & Industries*, 48 Or. App. 589, 617 P.2d 668 (1980), to similar effect, affirmed an award of damages by the commissioner to petitioner in amount of $2,500 as compensation for humiliation and mental anguish, under former ORS 659.010. Likewise, in *Portland v. Bureau of Labor*

& Industries, 61 Or. App. 182, 656 P.2d 353 (1982), *affirmed as modified*, 64 Or. App. 341, 343, 668 P.2d 433 (1983), *affirmed in part, reversed in part on other grounds* 298 Or. 104, 119, 690 P.2d 475 (1984), this Court affirmed a damage award under former ORS 659.010, of $15,000 for claimant's mental suffering resulting from employer's unlawful retaliation, which award was "intended to compensate claimant for damages she suffered because of the retaliation." It should be noted that those damage awards were affirmed even though the statutory language did not expressly authorize damage awards. *See also School Dist. 1 v. Nilsen*, 17 Or. App. 601, 523 P.2d 1041 (1974), *modified,* 271 Or. 461, 534 P.2d 1135 (1975), in which an award of non-economic damages for humiliation was not held to be categorically inappropriate under ORS 659.010, but there were insufficient facts in that case to support the award.

Prior to the revision of the employment law chapter in 2001, and consistently with the above rulings of the court, BOLI had regularly exercised its statutory authority, upon a finding of an unlawful employment practice, "to award money damages for emotional and mental suffering sustained and to protect the right of Complainant and others similarly situated." *See, e.g.*, *In the Matter of Douglas County*, 11 BOLI 1 (1992); *In the Matter of Snyder Roofing & Sheet Metal., Inc.*, 11 BOLI 61 (1992); *In the Matter of Sears, Roebuck and Company*, 18 BOLI 47, 79 (1999); *In the Matter of Barrett Business Services,*

Inc., 22 BOLI 77 (2001).

The legislature, in 2001, revised the statutory chapter on employment law, repealing chapter 659 and re-enacting it as chapter 659A. The provision relating to the scope of the cease and desist order, formerly ORS 659.010(2), was re-enacted as ORS 659A.850(4), with essentially the same language as that of the former statute, authorizing a cease and desist order that would require the employer to:

> (a) Perform an act or series of acts designated in the order that are reasonably calculated to carry out the purposes of this chapter, *to eliminate the effects of the unlawful practice that the respondent is found to have engaged in, and to protect the rights of the complainant and other persons similarly situated*[.]

(emphasis added). As can be seen, the operative language of the previous statute and the new statute were virtually identical.

In ascertaining its meaning, ORS 659A.850(4) must be understood not in isolation but in light of the prior case law and "the historical context against which that text was enacted." *Pipkin*, 354 Or. at 526. By the time ORS 659A.850(4) was (re-)enacted in 2001, virtually unchanged from its predecessor, ORS 659.010(2), its language had been consistently construed by the courts and consistently applied by BOLI over the course of the preceding 30 years to allow an award of non-economic damages upon a finding of an unlawful employment practice.

Similarly, between the 2001 revision and the amendment of the statute in 2007 and 2008, a time during which the statute did not expressly authorize a damage award, BOLI, consistently with its prior practice and prior case law, continued to exercise its authority to award non-economic damages as a remedy to "eliminate the effects of an unlawful practice found, and protect the rights of the complainant and other persons similarly situated." *See, e.g., In the Matter of Northwest Pizza, Inc*., 25 BOLI 79 (2004); *In the Matter of Magno-Humphries, Inc*., 25 BOLI 175 (2004); *In the Matter of Emerald Steel Fabricators, Inc.,* 27 BOLI 1 (2005).

The two relevant amendments to ORS 659A.850 occurred in the 2007 and 2008 legislatures. First, as was discussed in detail by Petitioner, a provision relating to claims of discrimination in real estate and housing matters and of disability discrimination, to bring Oregon law into compliance with federal law, was added as ORS 659A.850(1)(b). *See* 2008 Or Laws ch. 36 §12. Those amendments did nothing to alter the general applicability of ORS 659A.850 to *all* complaints before BOLI of *all* unlawful employment practices. ORS 659A.850(1)(a).

The second amendment, to subsection (4), was more directly apposite. The legislature reformatted the subsection, but also made one substantive change, namely, to explicitly authorize an award of "actual damages" by the

Commissioner. *See* 2007 Or Laws ch. 903 §10. Subsection (4) now authorizes a cease and desist order that would require the employer to:

> (a) Perform an act or series of acts designated in the order that are reasonably calculated to:
>
> (A) Carry out the purposes of this chapter;
>
> (B) Eliminate the effects of the unlawful practice that the respondent is found to have engaged in, *including but not limited to paying an award of actual damages suffered by the complainant* and complying with injunctive or other equitable relief; and
>
> (C) Protect the rights of the complainant and other persons similarly situated[.]

(emphasis added). Other than adding the highlighted text, the language of the current statute is the same as that of the 2001 version, which, as has been discussed, is virtually identical to the parallel provision in the predecessor statute, ORS 659.010(2), the language of all three of which should be consistently understood. The only difference among the three is that the text of the current iteration of the statute now makes express what had been implicit (albeit consistently understood), *viz.*, that an administrative damage award, including non-economic damages, if supported by the evidence,[6] is an appropriate provision of a cease and desist order, as an incident of the statutory directive to "[e]liminate the effects of the unlawful practice that the respondent

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[6] *See Nilsen*, 271 Or. at 484-86.

is found to have engaged in," and to '[p]rotect the rights of the complainant and other persons similarly situated[.]" The text of the statute now makes explicit what had previously been understood and provides expressly that an award of "actual damages" may be an appropriate step to eliminate the effects of *any* unlawful practice. Unlike ORS 659A.885, ORS 659A.850 does not distinguish between those unlawful employment practice for which compensatory damages may be awarded and those for which only equitable relief is appropriate, nor does it incorporate or even refer to ORS 659A.885. "Any," in ORS 659A.850(4) would still seem to mean "any,"[7] which would necessarily include violations of ORS 408.230.

None of the legislative history submitted by Petitioner touches on the propriety of an award of damages, non-economic or otherwise, for an unlawful employment practice, let alone this particular unemployment practice. While it may be that it was consistency with federal law that prompted the legislative discussion, there is nothing in the language of the amendment, or in the legislative history, to suggest that the amended language in subsection (4) was intended to be limited in applicability to matters addressing housing or real

[7] *See* note 4, *ante*.

estate or disability discrimination or indeed limited in any other way.[8] It is certainly not written that way. The only change to ORS 659A.850(4)(a)(B), the relevant portion of the statute, was the addition of "including but not limited to paying an award of actual damages suffered by the complainant" as an example of a way to "[e]liminate the effects of the unlawful practice that the respondent is found to have engaged in."

Whatever the legislature might have intended with regard to federal law, it is difficult to see how the addition of the "including but not limited to actual damages" language can be read as a limitation on the authority that BOLI already had prior to the amendment. That authority has always included the authority to award economic and non-economic damages upon a finding of an unlawful employment practice. The first level of analysis makes this clear.

C. "Actual damages" as used in ORS 659A.850(4) includes non-economic damages

In light of the above discussion, the conclusion must be that focusing on the "actual damages" language may be something of a red herring. As should be apparent, the authority of BOLI to award non-economic damages has never been dependent on the "actual damages" amended language. Rather, that

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[8]If, as Petitioner suggests, the only purpose for the amendment was to harmonize Oregon law with Federal law, the addition of the "actual damages" language would add nothing to the statute as it applies to unlawful employment practices.

authority predated the amendment, and is based, as it always has been, on the agency's authority to issue a cease and desist order requiring the respondent to "[e]liminate the effects of the unlawful practice that the respondent is found to have engaged in," ORS 659A.850(4)(a)(B),[9] and to "[p]rotect the rights of the complainant and other persons similarly situated" ORS 659A.850(4)(a)(C), and, more generally, to eliminate and prevent unlawful practices. ORS 659A.800(1). That language has been a consistent part of the statutory scheme, and the courts have seen it that way since at least 1971. *See Williams v. Joyce, supra.*

Even though the "actual damages" language is not really necessary to answer the question of the authority of BOLI to award non-economic damages, the language is now part of the text of the statute and its meaning must be considered. Upon consideration, the meaning of "actual damages" does not change the conclusion.

As this Court held in *Brewer v. Erwin*, 287 Or. 435, 448-9, 600 P.2d 398 (1979), "actual damages" for a statutory tort is not limited to economic damages and may include non-economic damages as well. The Court explained that the meaning of "actual damages," in the context of damages for a statutory violation, may or may not be co-extensive with the "actual damages"

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[9] To reiterate, if emotional harm is an effect of the unlawful practice, monetary compensation, by way of non-economic damages, is certainly one way of ameliorating the harm and eliminating the effect.

recoverable as a general matter of tort law, holding that "actual damages," in the statutory context,

> "is not equivalent to an openended measure of general damages for 'pain and suffering' drawn from tort law. We understand 'actual damages' or 'damages' to refer to compensation for tangible harm resulting from the statutory violation, *though it need not be economic harm*. The harm must be of a kind within the contemplation of the protective provision that was breached."

Id. (emphasis added); *see Brown v. Am. Prop. Mgmt. Corp*., 167 Or. App. 53, 58-9, 1 P.3d 1051 (2000).

The question under *Brewer*, then, is whether non-economic harm was "within the contemplation of the protective provision that was breached." As has been discussed, and as is relevant here, ORS 659A.800 - .850 protects employees from unlawful employment practices, and the legislature, by its addition of the "including actual damages" language into the statutory provision that already authorized an award of non-economic damages, has confirmed that such an award was, at very least, within its contemplation. Thus, under the rubric of *Brewer*, "actual damages" would perforce include non-economic damages.

If, on the other hand, the breached protective provision is seen as the veterans hiring preference in ORS 408.230, the same result obtains. As a purely logical matter, it certainly would be expected that a disabled veteran who qualified for but was not accorded the statutory veterans preference would

suffer from that disregard. The reason for the hiring preference was more than merely economically making up for the time the veteran was out of the workforce. Rather, it is also based a recognition of the non-monetary – and often life-jeopardizing – sacrifices made by veterans in service of the country and the often profound difficulties in returning to civilian life. In light of the information that has long been available surrounding the mental health issues that have plagued our veterans,[10] it would be disingenuous at best to suggest that emotional distress would not have been a contemplated effect of the violation of the statutory rights of the disabled veteran who was denied the preference to which he was entitled, and even more disingenuous to suggest that the legislature might have been somehow excusably oblivious to the fact.

Finally, even if it cannot be ascertained "whether the term 'actual damages' is intended to encompass non-economic loss, the inquiry is whether the award of non-economic damages is inconsistent with the general purpose of the statute[.]" *Brown*, 167 Or. App. at 59. With that as the case, it cannot be said that an award of emotional distress damages is in any way incompatible with

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[10] *See, e.g.*, Substance Abuse and Mental Health Services Administration (SAMHSA), U.S. Department of Health and Human Services (HHS), *In Brief: Behavioral Health Issues Among Afghanistan and Iraq U.S. War Veterans*, HHS Publication No. (SMA) 12-4670 (2012), attached hereto as Appendix A; Northeast ATTC, *Resource Links: Issues Facing Returning Veterans* (2007), attached hereto as Appendix B.

the language and the purpose of the statute and, for that reason alone, should be upheld.

IV. CONCLUSION

For the above reasons, *amicus curiae* OTLA respectfully requests that this Court affirm that portion of the opinion in *Multnomah County Sheriff's Office v. Edwards* 277 Or. App. 540, 373 P.3d 1099 (2016), relating to the authority of BOLI to award non-economic damages for an unlawful employment practice.

Respectfully submitted,

/s/ Michael E. Rose
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CERTIFICATE OF COMPLIANCE

I certify that (a) this Brief of *Amicus Curiae* complies with the word-count limitations of ORAP 9.05(3)(a), and that the word-count of this petition (as described in ORAP 5.05) is 4931 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and the footnotes as required by ORAP 5.05.

/s/ Michael E. Rose
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CERTIFICATE OF FILING and SERVICE

I certify that on 6 October, 2016, I filed the original foregoing Brief of *Amicus Curiae* with the Appellate Court Administrator to be filed with this Court and to be served upon the following counsel through the eFiling system.

I further certify that on the same date I served the foregoing Brief of *Amicus Curiae* by sending two copies thereof via United States Postal Service First Class Mail and addressed to the following parties:

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