
Civil Rights Division - Bureau of Labor and Industries
NOTICE OF SUBSTANTIAL EVIDENCE DETERMINATION

Complainant: Carolyn Amber Kinney

Respondent: Multnomah County, District Attorney's Office

Case Number: EEEMX220721-11051

Investigator: Brandon Reeves

Filing Date: July 21, 2022

Reviewed By: 

I. JURISDICTION

Oregon Revised Statutes chapters 659A, ORS 25.337, 25.424, 171.120, 345.240, 441.184, 476.576, 651.060, 651.120, 652.355, 653.060 and 654.062, and Oregon Administrative Rules chapter 839 divisions 2, 3, 4, 5, 6, 9 and 10 authorize the Civil Rights Division to accept, investigate, amend, resolve and determine complaints alleging unlawful practices in employment, housing, places of public accommodation, state government and career, professional and trade schools.

Specific facts supporting a conclusion that the Division has jurisdiction over Respondent(s) are found below.

II. SYNOPSIS

Complainant alleges Respondent discriminated against her because of her sex/gender and marital status. She also alleges Respondent retaliated against her for opposing and reporting unlawful practices. Respondent denies this, maintaining that it neither unlawfully discriminated against Complainant nor retaliated against her.

As discussed in more detail below, BOLI finds substantial evidence supporting some of Complainant's claims, namely, her claims of sex/gender discrimination and retaliation. The rest of Complainant's claims are dismissed due to lack of substantial evidence. ¹

List of Relevant Evidence

File Evidence	Brief Description
BOLI Exhibit 1	Complainant's Initial Interview with Multnomah County retained Internal Investigator – Amy Angel of Barran Liebman. (Windows

¹ Substantial evidence means proof that a reasonable person would accept as sufficient to support the allegations of the complaint. OAR 839-00-0005(15)(a).

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	Media Audio File).
BOLI Exhibit 2	Complainant's BOLI Discrimination Complaint
BOLI Exhibit 3	Complainant's January 2022 Resignation Letter
BOLI Exhibit 4	Respondent's September 2022 Position Statement
BOLI Exhibit 5	Multnomah County Investigation Report
BOLI Exhibit 6	Respondent's Response to BOLI's March 2023 Request for Information
BOLI Exhibit 7	Deputy District Attorney Matrix 2021/2022 (provided by Complainant)
BOLI Exhibit 8	Complainant's "Rubik's Cube" Documentation of Promotions from July 2020 to February 2022.
BOLI Exhibit 9	Complainant's Annual Reviews/Employment Evaluations (2015 – 2021)

III. BRIEF SUMMARY

Respondent hired Complainant as a Deputy District Attorney (DDA) in 2008. During her employment, specifically under the leadership of District Attorney (DA) Mike Schmidt, she faced challenges with Respondent's Homicide Call-out policy. She believes that this policy unfairly disadvantaged married women working in the office. Moreover, she accuses Respondent of exhibiting a bias favoring men in its hiring and promotion practices, particularly concerning upper-level leadership attorney positions. Complainant believes that this bias contributed to her being denied a promotion at the leadership level. In late September or early November 2021, she raised complaints regarding these matters. In response, Complainant alleges that Respondent retaliated against her by further withholding her promotion, ultimately leading her to resign in February 2022.

IV. RESPONDENT OFFICE STRUCTURE

At the time relevant to Complainant's complaint, Respondent employed approximately 75 DDAs. These DDAs were assigned to three main Divisions, each with specialized units focusing on different types of criminal activities. Each division was (and still is) headed by a Chief DDA.

- **Division One.** Led by Chief DDA Glen Banfield, consisted of the Domestic Violence Unit, Juvenile Unit, Support Enforcement Division, and the Misdemeanor Trial and Intake Units (MTU).
- **Division Two.** Headed by Chief DDA Kristen Snowden, included the Strategic Prosecution Unit, Pretrial Unit, and Unit C, which specialized in cases related to robbery, burglary, gun and other weapon crimes, and vehicular homicide.
- **Division Three.** under the leadership of Chief DDA Don Rees, comprised the Multi-disciplinary Team Unit (MDT) (responsible for prosecuting child abuse cases, including Ballot Measure 11 and Jessica's Law cases and homicides), Unit A/B (responsible for handling cases of theft, fraud, identity theft, drugs, gambling,

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and human trafficking), and Unit D (responsible for handling cases of assault, sex crimes, and aggravated assaults).

Complainant primarily worked within Respondent's Division Three, specifically within the MDT.

Each DDA was assigned a rank that reflected their skill level and tenure in the office. The ranks included Levels 1-4, with the highest rank being Chief. In 2015, Respondent promoted Complainant to the position of Level 3 DDA, which she held until her resignation.

V. ANALYSIS

A. The Evidence Does Not Support Complainant's Marital Status Discrimination Claim.

Oregon law prohibits employers from discriminating against individuals based on their marital status. Complainant argues that Respondent's Homicide Call-out policy violates the law because it requires married employees to respond to homicide incidents at unpredictable hours, causing them to be away from their families for extended periods with little to no notice. *See* BOLI Exhibits 2 and 3. Complainant further argues that the policy disproportionately impacted married women due to a pattern in Respondent's office, where—according to her—most women had partners who were employed while most men had partners who stayed at home. *Id.*

Notwithstanding the above, the evidence available does not support Complainant's discrimination claim. Most notably, Complainant has not established a clear connection between the alleged discriminatory impact of the policy and her marital status. In addition to being married, Complainant has small children and a full-time working spouse, factors that are not exclusive to marital status. And Complainant seems to urge it was actually those factors (the associated extra-work obligations to her family) that made adhering to the policy so burdensome. *Id.*

Moreover, the available evidence does not suggest that the challenges experienced by Complainant are specific to married women with family responsibilities outside of work. Although it is acknowledged that balancing full-time work with raising a family can be demanding and stressful, it is important to note that unmarried DDAs also encounter similar pressures and strains when juggling work and non-work obligations. *See* BOLI Exhibit 5, page 54 (discussing Disparate Impact of Workload on Attorneys with Families).²

² Attorneys in Respondent's office expressed difficulties in effectively balancing their work duties with family obligations, particularly regarding caring for elderly parents. These external responsibilities were further complicated by the impact of the global COVID-19 pandemic.

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Additionally, there is no evidence to suggest that Respondent intentionally implemented the policy to target or negatively impact married individuals, specifically married women with children and full-time working spouses. Respondent has provided a detailed explanation of the policy's rationale, which involves assigning DDAs based on the nature of the homicide case and the availability of the assigned DDA or relevant unit. *See* BOLI Exhibit 4, pages 3-4 (Response to Allegation No. 8).

Based on the above, Complainant's marital status discrimination claim is dismissed.

B. The Evidence Supports Complainant's Sex Discrimination Claim In Part.

Complainant asserts two different theories of sex discrimination: (1) hostile work environment and (2) disparate impact. The evidence does not support Complainant's hostile work environment claim, but—as discussed in more detail below—there is substantial evidence supporting her disparate impact claim.

a. The Evidence Does Not Support Complainant's Hostile Work Environment Claim.

To establish a hostile work environment claim, Complainant needs to show: (1) the work environment was objectively and subjectively offensive; (2) the harassment complained of was based on Complainant's protected class (here gender/sex); (3) the conduct was either severe or pervasive; and (4) there is a basis for employer liability.

Here, even though Complainant characterizes Respondent's office as a hostile work environment, she fails to allege any facts or provide any evidence of harassment—*e.g.*, offensive jokes, name calling, physical assaults or threats, ridicule or mockery, insults or put-downs, exposure to offensive imagery, *etc.* As a result, Complainant's claim of a hostile work environment is dismissed.

b. The Evidence Supports Complainant's Disparate Impact Claim.

Discrimination based on a disparate impact theory occurs when an on-its-face neutral decision, practice, or policy has a disproportionately negative effect on a protected group. To establish a disparate impact claim, Complainant must establish that: (1) Respondent is a *respondent* as defined by ORS 659A.001(10); (2) Respondent has a standard or policy that is applied equally; (3) the standard or policy has the effect of screening out or otherwise affecting members of a protected class at a significantly higher rate than others who are not members of that protected class; and (4) Complainant is a member of the protected class and has been adversely affected by Respondent's standard or policy, resulting in harm. *See* OAR 839-005-0010 (2).

Here, Complainant has alleged facts and identified evidence supporting each element of the claim. *See* BOLI Exhibit 2, 3, 7, and 8. The main issue raised in her complaint

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revolves around Respondent's promotion policy/practice, particularly in relation to the highly sought-after and infrequent Level 4 DDA promotions. *Id.* The implementation of this policy, led to a significant disparity in the number of men and women holding leadership positions (*i.e.*, holding the rank of Level 4 or higher) within Respondent's office during the initial months of DA Schmidt's tenure. *Id.* Despite an almost equal distribution of male and female attorneys overall, only around 20% of women compared to 80% of men held leadership positions. *Id.* Additionally, Complainant emphasizes that this imbalance had broader implications, as attorneys in leadership roles receive higher compensation. *Id.*

Complainant's claim is further supported by several factors. First, while Complainant was employed, there was no formal application process or notice for Level 4 or higher promotion opportunities. *See* BOLI Exhibit 5, pages 16-17. Secondly, the decision-making team responsible for promotions was predominantly male.³ *Id.* Lastly, the promotion criteria are unclear and vague. *Id.* According to Respondent, when a Level 4 DDA position opens, the Chief DDAs and First Assistant meet to discuss viable candidates. *Id.* During these meetings, they consider various factors—many of which are extremely subjective—such as:

- Perceived readiness for promotion
- Experience relevant to the available position
- Prior work experience
- Seniority
- Trial skills
- Work ethic
- Management, communication, and organizational skills
- Writing skills
- Ability to work with a team, and
- A demonstrated willingness to promote the DA's policy and philosophical direction.

Respondent has not provided details on how these factors are weighed or scored, except to state that they are all taken into consideration. For example, Respondent says that seniority, while an important factor, holds less influence in promotions to Level 4 because the necessary skills for effective performance at that level are assessed in a more holistic manner. *Id.*

³ From August 2020 to January 2022, Respondent promotional decisions makers included: DA Schmidt, First Assistant Jeff Howes, and Chief DDAs Don Rees, Glen Banfield/John Casalino, and Kirsten Snowden.

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Once decisions are made, the Chiefs submit their recommendations to the DA, who has complete discretion to affirm or deny the suggestions and can choose alternative candidates for promotion if there are concerns or alternative options.⁴ *Id.*

In the first 18 months of his tenure (from August 2020 to January 2022), DA Schmidt promoted five men to Level 4 or higher:

- Glen Banfield – promoted to Chief in July 2021.
- Todd Jackson – promoted to Level 4 DDA in July 2021.
- Kevin Demer – promoted to Level 4 in September 2021.
- Shawn Overstreet – promoted to Level 4 DDA in September 2021.
- Eric Zimmerman – promoted to Level 4 DDA in October 2021.

See BOLI Exhibits 5, 6, 7 and 8. He also created a new Justice Integrity Unit (JIU) and appointed Ernie Warren as the sole Level 4 DDA for the unit (September 2021). *Id.* However, during this same period, Schmidt promoted only one woman, Amanda Nadell (July 2021), to Level 4 or higher, despite the majority of eligible employees for leadership positions being women.⁵ *Id.*

Again, these circumstances strongly support Complainant's disparate impact theory. The lack of transparent and standardized criteria for promotions at Level 4 and above, combined with the subjective decision-making of Schmidt and his leadership team, resulted in a significant disparity in the promotion rates between men and women. It is undeniable that this disparity directly impacted Complainant, a woman and Level 3 DDA eligible for promotion that was never promoted.

However, it is worth noting that *after* Complainant raised concerns about gender bias and subsequently resigned (February 2022), Respondent—still utilizing the above outlined promotional process—promoted several women to Level 4. *See* BOLI Exhibits 4,5, and 8.⁶ Although this is a positive development, it also lends credibility to Complainant's assertion. Had she not acted, the concerning trend may have persisted. Moreover, the sudden increase in female promotions raises questions about why such progress did not happen sooner and strongly suggests that Respondent was always aware of the competent and capable (*i.e.*, promotable) women within the organization.

⁴Respondent could not recall a time where the recommendation put forward by the Chiefs and First Assistant was not accepted by Schmidt. Rees stated that Schmidt's promotional decisions always reflected the slate of recommended candidates. *See* BOLI Exhibit 2, Page 16.

⁵ At the start of Schmidt's tenure, there were roughly 28 Level 3 DDAs, with the majority (approx. 17) being women. Schmidt primarily promoted individuals from this pool. *See* BOLI Exhibit 7 (Deputy District Attorney Matrix 2021/2022), which mentions 26 Level 3 DDAs, excluding the promotions of Nadell and Jackson to Level 4 (both July 2021) prior to the Matrix update.

⁶ Since Complainant's departure, Schmidt promoted Nichole Rhoades, Melissa Marrero, Nicole Hermann, Mariel Mota, and Kate Molina to Level 4 DDA.

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But still, Respondent maintains its promotional decisions were and have always been based only on “merit, knowledge, skills, and abilities” and that this fair framework was applied to Complainant during her employment. *See* BOLI Exhibit 6, Response to RFI 4 (d). Respondent says it chose not to promote Complainant because of significant doubts about her ability to lead and supervise. *See* BOLI Exhibits 4 and 5. For example, Respondent worried about Complainant’s alleged “negativity relating to the office” and her “open hostility toward management, including policy decisions made by Schmidt and executed by management, as well as [Complainant’s] lack of willingness to act as a team player....” *See* BOLI Exhibit 5, page 34.

Respondent also expressed concerns about Complainant’s judgement, citing her behavior towards Schmidt during his campaign for District Attorney. *Id.* Complainant allegedly posted questions on social media scrutinizing his concern for victims and suggested he was not the most qualified candidate for the position. Respondent also took issue with Complainant’s posts on the social media platform TikTok, her allegedly unprofessional intra-office communications, and the one time she requested Schmidt to observe her during trial. *Id.* Finally, Respondent claims Complainant was simply not the most qualified or experienced candidate for available promotion opportunities. *Id.*

Respondent has presented evidence supporting some of its claimed concerns regarding Complainant’s office communications and social media posts. *See* BOLI Exhibit 5, pages 138-159.⁷ However, there is conflicting evidence. Complainant’s performance evaluations from 2015-2021 show a positive working relationship with management and supervisors, and office-wide confidence in her abilities as a mentor and lawyer. *See* BOLI Exhibit 9. The evaluations consistently rated Complainant as meeting or exceeding expectations in all categories, including leadership, judgment, and communication. *Id.* And there were no recorded comments or concerns relating to her lack of ability in those areas. *Id.*

Considering Complainant’s outstanding performance ratings and extensive fourteen-year tenure at Respondent’s office, which included multiple years as a Level 3 DDA, it is clear from the record that she possessed the qualifications and experience required for a Level 4 promotion, especially during Schmidt’s tenure. Given these facts, it is challenging to accept (and the record does not support) Respondent’s assertion that Complainant’s gender was not a factor in Respondent’s decision not to promote her.

C. The Evidence Supports Complainant’s Retaliation Claim.

⁷ Included are copies of correspondence between Complainant and Respondent regarding Complainant’s coordination efforts for an office wide promotional TikTok video. Complainant expressed concern to supervisors about the perceived inappropriateness of her efforts. Respondent also presents an email where Complainant responded to an office-wide farewell email for Jenna Plank, expressing gratitude for Plank’s years of service. Respondent interpreted Complainant’s response as self-seeking.

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To establish a claim for retaliation, Complainant must demonstrate three essential elements: (1) engagement in protected activity, (2) occurrence of an adverse employment action by Respondent, and (3) a causal connection between the protected activity and the adverse action.

In this case, the evidence strongly supports all elements of the claim, particularly Complainant's contention that Respondent refused to promote her because she complained about gender discrimination. First and foremost, Complainant actively engaged in protected activity, and despite Respondent's denial, there is evidence indicating its awareness of her protected activity. During a union meeting in September 2021, Complainant voiced her concerns about gender discrimination to her colleagues. See BOLI Exhibits 1 and 5. She highlighted the trend of women leaving the office in large numbers while men were consistently being promoted to fill their positions. *Id.* While Respondent's leadership claims ignorance of Complainant's specific complaint, they do admit awareness of general discussions about gender bias during that meeting, albeit without attributing them to any individual. See BOLI Exhibit 5, pages 39-40.

During this critical period, Jenna Plank, a departing Level 4 DDA, sent an email to Chief Snowden proposing the addition of a second Level 4 DDA in the misdemeanor unit (MTU) (see excerpts from Plank email below):

From: PLANK Jenna <Jenna.PLANK@mcda.us>
Sent: Wednesday, September 15, 2021 8:30 AM
To: SNOWDEN Kirsten <Kirsten.Snowden@mcda.us>
Subject: Misdemeanor Unit Idea

I'm sure management will *not* immediately be warm to this idea, but what if the office were to add Amber (or someone) as a second level 4 on rotation to help manage the misdemeanor unit until things stabilize and some of the policy goals for misdemeanors are actualized?

We have been discussing for ages possible combining MTU and SPU in order to build in another supervisor – and that was before caseloads blew up, before Mike wanted to implement policy changes at the misdo level, before community court needed to be retooled, and before the massive turnover. With so many brand new people churning through the unit, you really need more than one person for the new DDAs to go to. Adding a second 4 to the unit would be justifiable in this exact moment, for a limited duration, in order to get some of the policy changes Mike wants to see get off the ground.

Obviously, you could put a variety of people in that position as the 2nd level 4 on rotation, but Amber immediately came to my mind for the following reasons: 1) she could take all of her currently issued and pending trial MDT cases with her to MTU and still handle those, 2) she used to supervise community court (hence, Amber's list) and would be perfectly situated to do the community service provider outreach to get this off the ground, 3) she's good with the new attorneys and good with recruitment matters AND 4) because she'd seemingly be an excellent fit to take over supervision of the Juvenile unit when Lori retires, thus making a rotation as a 4 a good fit timing wise.

OK - -I'm done.

Jenna

See BOLI Exhibit 5, pages 183-184.

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Chief Snowden subsequently shared Plank's idea—including the possibility of promoting Complainant—with the rest of Respondent's leadership team. *See* BOLI Exhibit 5, page 34. However, Schmidt expressed reservations about promoting Complainant. Around this time, he had heard from multiple sources that if she was not promoted, she was prepared to "go public" or "do something really bad." *Id.* Schmidt's hesitation stemmed from his concern that promoting her under such circumstances could be perceived as rewarding a threat to management in general, or specifically himself. *Id.* In fact, Schmidt recalls telling his executive team—specifically about Complainant—that he would not endorse the promotion of someone metaphorically "holding a gun to his head." *Id.*

And as if seemingly predicted by Schmidt, in October 2021, Complainant sought legal advice from employment law attorney Dana Sullivan, whom she (Complainant) retained briefly in November 2021. *See* BOLI Exhibits 1 and 5. This information was communicated to the union's attorney, who then informed the union board—which included President and Level 4 DDA Amanda Nadell—about Complainant's legal representation. *Id.* While Respondent disputes having knowledge of this, a senior member of its HR department with extensive experience noted Complainant's diligent documentation and proactive pursuit of meetings during this time, which raised suspicions. *See* BOLI Exhibit 5, page 40. Moreover, other members of Respondent's leadership team openly acknowledged being aware of the rumors circulating within the office regarding Complainant's potential lawsuit. *Id.*

While Respondent denies retaliation, Schmidt's comments cannot be easily dismissed. Again, the lack of concrete, objective, or standardized criteria for Level 4 promotional decisions, other than Schmidt's and his leadership team's subjective judgment, highlights the significance of his remarks. Furthermore, considering Schmidt's role as the ultimate decision maker, his comments strongly suggest that he intended to use Complainant's protected activities as a factor against her when considering her for any promotional opportunities (even more so than the concerns expressed by Schmidt and others about the Complainant's suitability for a Level 4 position). Consequently, Schmidt's statements alone serve as substantial and compelling evidence in support of Complainant's retaliation claim.

D. The Evidence Supports Complainant's Constructive Discharge Claim.

Complainant alleges that Respondent subjected her to unbearable working conditions, ultimately leading to her resignation. She specifically claims that these conditions resulted from Respondent's retaliatory actions, particularly its refusal to promote her to Level 4 DDA.

To establish her claim of constructive discharge, Complainant must prove the following elements: (1) Respondent intentionally created or maintained discriminatory working conditions based on her protected activity; (2) the working conditions were so intolerable that a reasonable person in her situation would have resigned; (3) Respondent intended

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for her to leave employment due to the working conditions, or knew or should have known that she was highly likely to leave employment as a result of the working conditions; and (4) she resigned from her job because of the working conditions.

Based on the previous discussion, there is sufficient evidence to support all elements of the claim. Schmidt's "gun-to-head" comments suggest that Respondent chose not to promote Complainant to Level 4 DDA—at least in part—due to her protected activity, and this despite its awareness of her desire for a promotion to Level 4. Moreover, Respondent took deliberate steps to demonstrate its disinterest in promoting Complainant.

Following Complainant's discrimination allegations, Respondent took two significant actions, one of which involved the establishment of a new DDA rank. In December 2021, Respondent designated several Level 3 DDAs to the newly created Lead Level 3 DDA position. To be eligible for this position, individuals had to meet specific, objective criteria, such as being a Level 3 DDA with at least eight (8) years of service in Respondent's office, handling complex Ballot Measure 11 cases, and being involved in at least one homicide scene in the last year. *See BOLI Exhibit 5, page 194.* Complainant, along with seven women and one man, was promoted to this position. *Id.*

Furthermore, Respondent's next several Level 4 promotions were given to women, one of whom was Melissa Marrero, who had just been named a Lead Level 3. *See BOLI Exhibit 4, Response to Allegation 11 (d).* Her promotion was announced in December 2021 (shortly after Respondent likely became aware of rumors regarding Complainant's protected activity) and was scheduled to take effect in February 2022. *See BOLI Exhibit 5, page 194.* Complainant explains that she had worked for Respondent four years longer than Marrero, mentored her, and had more experience as an attorney. *See BOLI Exhibit 1.* However, Respondent counters, asserting that Marrero was highly qualified for the position, possessed more knowledge in the specific area of law required, and was generally better prepared to take on the role. *See BOLI Exhibit 5, page 44.* Setting aside the parties' dispute over qualifications (as the evidence indicates either Complainant or Marrero would have been appropriate selections for promotion), a significant difference between Complainant and Marrero that cannot be overlooked is the fact that Complainant had accused Respondent of gender discrimination, whereas Marrero had not.

These points are crucial because they indicate that Respondent had apparently overcome its male gender bias in promotions. However, Complainant was still being overlooked for Level 4 promotions she was qualified for. Again, given Schmidt's comments, this appears intentional on Respondent's part and certainly conveyed to Complainant that she would likely never be promoted to Level 4 under Schmidt's leadership. Given these circumstances, it would be reasonable for anyone in Complainant's position to resign, and Respondent knew or should have known that this would be the likely result.

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There is at least substantial evidence here to support Complainant's claim for constructive discharge.

VI. CONCLUSION

The Bureau of Labor and Industries, Civil Rights Division, finds SUBSTANTIAL EVIDENCE OF AN UNLAWFUL EMPLOYMENT PRACTICE on the basis of sex/gender in that Respondent subjected Complainant to different terms and conditions of employment, retaliation for engaging in protected activity, and constructively discharged Complainant due to ongoing retaliation, all in violation of ORS 659A.030 (1) and 659A.199.

/s/ Brandon Reeves _____

Brandon Reeves

Senior Investigator

Civil Rights Division