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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

May 18, 2023

Representative Janelle Bynum
900 Court Street NE H276
Salem OR 97301

Re: Equal Pay Laws

Dear Representative Bynum:

You submitted several questions related to Oregon's equal pay law. We provide our answers to each of your questions below. We reworded some of your questions for clarity and grouped your questions together on the same or similar subjects of accrual of seniority, bona fide factors to determine compensation differentials, and protected classes.

We note at the outset that there is little case law providing guidance on many of the questions you submitted. Our conclusions, therefore, cannot be entirely free from doubt. Additionally, Question 10 related to "protected classes" would require more time and research to provide a more specific analysis with respect to each of the groups you identified in the question.

I. Accrual of Seniority

A. Family Leave

Question 1: Does Oregon law prohibit the accrual of seniority when an individual utilizes family leave?

Answer: No.

Oregon's equal pay laws are silent regarding whether an employee's leave taken under the Oregon Family Leave Act (OFLA) may be included in the calculation of that employee's length of service to determine seniority status. OFLA itself neither prohibits nor requires an employee's leave taken under OFLA to be included in the calculation. However, OFLA does not guarantee that the employee's leave taken under OFLA will be included in the calculation. Instead, we read the statute effectively to allow an employer to determine whether an employee's period of family leave will be included in the calculation.

Oregon's Equal Pay Law

Under Oregon's equal pay law, an employer engages in an unlawful employment practice if the employer pays "wages or other compensation to any employee at a rate greater than that at which the employer pays wages or other compensation to employees of a protected class for

work of comparable character."[1] But the law provides exceptions. An employer may pay employees "for work of comparable character at different compensation levels if all of the difference in compensation levels is based on a bona fide factor that is related to the position."[2] Among those bona fide factors is a "seniority system."[3]

ORS 652.220 does not describe what constitutes a "seniority system." The Bureau of Labor and Industries describes it in an applicable administrative rule as a system that "recognizes and compensates employees based on length of service with the employer."[4]

Oregon Family Leave Act

The Oregon Family Leave Act provides for employees of a "covered employer" to take leave for specified purposes related to the employee's health or the health or death of certain members of the employee's family.[5] A "covered employer" is one that employs "25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks in the year in which the leave is to be taken or in the year immediately preceding the year in which the leave is to be taken."[6]

When an employee returns to work following leave under OFLA, the employee is "entitled to be restored to the position of employment held by the employee when the leave commenced if that position still exists."[7] If the position no longer exists, the employee is "entitled to be restored to any available equivalent position with equivalent employment benefits, pay and other terms and conditions of employment."[8]

During the employee's leave, the employee may not lose "any employment benefit accrued before the date on which the leave commenced."[9] However, OFLA does not "entitle any employee to . . . [a]ny accrual of seniority . . . during a period of family leave."[10]

Answer to Question 1

Oregon's equal pay laws are silent regarding whether an employee's leave taken under OFLA may be included in the calculation of that employee's length of service to determine seniority status. OFLA itself neither prohibits nor requires an employee's leave taken under OFLA to be included in the calculation. However, OFLA does not guarantee that the employee's leave taken under OFLA will be included in the calculation. Instead, we read the statute effectively to allow an employer to determine whether an employee's period of family leave will be included in the calculation.

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[1] ORS 652.220 (1)(b).
[2] ORS 652.220 (2)(a).
[3] ORS 652.220 (2)(a)(A).
[4] OAR 839-008-0015 (1).
[5] ORS 659A.159 (1).
[6] ORS 659A.153 (1).
[7] ORS 659A.171 (1).
[8] *Id*.
[9] ORS 659A.171 (2).
[10] ORS 659A.171 (3).

B. Massachusetts and Rhode Island

Question 2: How does Oregon's equal pay law compare to Massachusetts' Equal Pay Act with regards to seniority?

Answer: While Massachusetts explicitly requires an employee's family and medical leave to be included in the determination of that employee's seniority status for purposes of the state's equal pay laws, Oregon's law is silent on the matter.

Question 6: Does anything in Oregon law prohibit the adoption of a provision like Massachusetts' and Rhode Island's equal pay laws?

Answer: No.

Massachusetts

In Massachusetts, an employer may not "discriminate in any way on the basis of gender in the payment of wages, or pay any person in its employ a salary or wage rate less than the rates paid to its employees of a different gender for comparable work."[11] Like Oregon, Massachusetts provides exceptions. One exception permits "variations in wages" if those variations are based on "a system that rewards seniority with the employer."[12] Unlike Oregon, Massachusetts explicitly provides that "time spent on leave due to a pregnancy-related condition and protected parental, family and medical leave, shall not reduce seniority."[13]

In short, Massachusetts explicitly requires an employee's "pregnancy-related condition and protected parental, family and medical leave" to be included in the determination of that employee's seniority status for purposes of the state's equal pay laws.

Rhode Island

In Rhode Island, an employer may not "pay any of its employees at a wage rate less than the rate paid to employees of another race, or color, or religion, sex, sexual orientation, gender identity or expression, disability, age, or country of ancestral origin for comparable work."[14] Like Massachusetts, Rhode Island explicitly provides an exception for pay differentials based on "[a] seniority system; provided, however, that time spent on leave due to a pregnancy-related condition or parental, family, and medical leave shall not reduce seniority."[15]

In short, like Massachusetts, Rhode Island requires an employee's "pregnancy-related condition or parental, family, and medical leave" to be included in the determination of that employee's seniority status.

Answers to Questions 2 and 6

As discussed more thoroughly in Question 1 above, Oregon does not require nor prohibit an employee's family leave to be considered in that employee's length of service to determine seniority status. Oregon effectively allows employers to determine whether an employee's period

[11] Mass. Gen. Laws ch. 149, sec. 105A (b).
[12] *Id*.
[13] *Id*.
[14] R.I. Gen. Laws sec. 28-6-18 (a).
[15] R.I. Gen. Laws sec. 28-6-18 (b)(2)(i).

of family leave will be included. If the Legislative Assembly intends to replicate Massachusetts and Rhode Island by requiring an employee's family leave to be included in the calculation of that employee's length of service to determine seniority, the provisions of Oregon's equal pay laws would need to be amended to establish the requirement.

We see nothing in the Oregon Constitution that would prohibit the Legislative Assembly from enacting a requirement that an employee's period of family leave be included in the calculation of that employee's length of service to determine seniority. Therefore, the determination is one of policy preference.

II. Bona Fide Factors to Determine Compensation Differentials

Question 3: Because experience is seemingly not defined in the equal pay law, can employers utilize standards of "experience" that may include:

a. Relevant experience
b. Lived experience
c. Language experience

Bona Fide Factors Under Oregon Law

An employer that pays "wages or other compensation to any employee at a rate greater than that at which the employer pays wages or other compensation to employees of a protected class for work of comparable character" engages in an "unlawful employment practice" under ORS 652.220 (1)(b). A "protected class" is "a group of persons distinguished by race, color, religion, sex, sexual orientation, gender identity, national origin, marital status, veteran status, disability or age."[16] In short, employers may not pay higher wages to some employees than to others who perform "work of comparable character."

But the law provides exceptions. Under ORS 652.220 (2)(a), an employer may pay employees "for work of comparable character at different compensation levels if all of the difference in compensation levels is based on a bona fide factor that is related to the position in question."[17] Each "bona fide factor" must be based on:

> (A) A seniority system;
> (B) A merit system;
> (C) A system that measures earnings by quantity or quality of production, including piece-rate work;
> (D) Workplace locations;
> (E) Travel, if travel is necessary and regular for the employee;
> (F) Education;
> (G) Training;
> (H) Experience; or
> (I) Any combination of the factors described in this paragraph, if the combination of factors accounts for the entire compensation differential.[18]

[16] ORS 652.210 (6).
[17] Emphasis added.
[18] ORS 652.220 (2)(a).

Another exception allows employers to pay employees for work of comparable character at different compensation levels based on one or more of the itemized factors above "that are contained in a collective bargaining agreement."[19]

These exceptions (*i.e.*, "bona fide factors") relate to employees themselves and allow an employer to look at the characteristics and qualifications of specific individual employees to determine their wage amounts. But ORS 652.220 does not expound upon the meanings of the itemized exceptions. The statute only provides the unifying characteristic of all of the exceptions as being "related to the position in question."[20] The Bureau of Labor and Industries (BOLI) provides more detail for each exception through OAR 839-008-0015. Specific to experience considerations, they must "include, but are not limited to, any relevant experience that may be applied to the particular job."[21]

Between ORS 652.220 and OAR 839-008-0015, considerations related to an employee's experience must be "related to the position in question," "relevant" to the position, and experience that "may be applied to the particular job."

Answers to Question 3

Turning to the specific types of experience you listed in your question, you asked whether employers may consider:

(a) Relevant experience.

The answer is yes. Under OAR 839-008-0015, BOLI requires that any consideration related to experience (and any other bona fide factor) be experience that is "relevant" to the position under consideration.

(b) Lived experience.

We understand your question to be asking about experience obtained outside the employment context, but instead obtained perhaps through education or general life circumstances. Under both ORS 652.220 and OAR 839-008-0015, an employer may consider experience that is "related" to the position, "relevant" to the position, and that may be "applied to the particular job." BOLI does not limit the characteristics of experience just to "relevant experience" and experience capable of being "applied to the particular job," because OAR 839-008-0015 also suggests there are other potential considerations (*i.e.*, experience considerations "include, but are not limited to, any relevant experience that may be applied to the particular job").[22] But these other potential considerations, under a plain reading of both ORS 652.220 and OAR 839-008-0015, must still be related, relevant, and applicable to the job in question.

Based on the above discussion, we believe an employer may be able to consider an employee's "lived experience" when determining whether that employee has experience that permits greater pay than others who work in the same type of job but who do not have the same or similar lived experience. This consideration would be highly contextual, and the "lived experience" must still be related, relevant, and applicable to the job in question.

[19] ORS 652.220 (2)(b).
[20] ORS 652.220 (2)(a) (emphasis added).
[21] OAR 839-008-0015 (8) (emphasis added).
[22] Emphasis added.

(c) Language experience.

As with the discussion above for lived experience, we believe an employer may be able to consider an employee's language experience when determining whether that employee has experience that permits greater pay than others who work in the same type of job but who do not have the same or similar language experience. This consideration would be highly contextual, and the language experience must still be related, relevant, and applicable to the job in question.

Question 4: How much latitude will courts provide an employer who innovates within the bona fide factors given that they are not fully defined, such as with the above example regarding experience?

Answer: Oregon courts are likely to apply a "credible evidence" standard to employers who seek to prove a pay differential is based on a bona fide factor.

An employee who claims a violation by an employer of the equal compensation requirement under ORS 652.220 (1)(b) has three options to resolve the dispute.[23]

The employee's first option is to file a complaint with the Commissioner of BOLI. The complaint could lead to an investigation by the commissioner, which may then lead to a contested case proceeding at which the commissioner must determine whether the employer is in violation of the equal compensation requirement. This option could result in fines and penalties imposed by the commissioner against the employer. Alternatively, an employee may exercise a second option to file a civil action against the employer to recover unpaid wages owed to the employee because of the employer's failure to comply with ORS 652.220.[24]

The employee's third option is to file a civil action against the employer seeking "injunctive relief and any other equitable relief that may be appropriate," along with back pay for the preceding two years, either compensatory damages or $200 (whichever is greater), and punitive damages.[25]

Oregon courts have held that plaintiffs do not have a difficult task to make a *prima facie* case against an employer on a claim under ORS 652.220 (1)(b).[26] Employees need only show they were performing work comparable to that of other workers whose pay is higher.[27] Employees

> do not have the burden of proving that the pay differential was based on [protected class characteristics]. Rather, the burden is on the [employer] to prove as an affirmative defense that the pay disparity is based on a particular factor other than [a protected class characteristic] as provided in ORS 652.220(2).[28]

Prior to 2017, the affirmative defense in ORS 652.220 (2) was one of "good faith," but the Legislative Assembly replaced the "good faith" affirmative defense with the bona fide factors currently listed under subsection (2).[29] Oregon courts have not had occasion to determine the precise standard they would use to determine whether an employer satisfies the requirement that

[23] ORS 652.220 (7).
[24] *Id*.
[25] ORS 659A.885 (1) and (3)(a).
[26] *See Smith v. Bull Run Sch. Dist. No. 45*, 80 Or. App. 226, 229, rev den., 302 Or. 86 (1986).
[27] *Id*.
[28] *Id.*
[29] Section 2, chapter 197, Oregon Laws 2017.

a compensation differential is based on a bona fide factor. The standard the courts used under the "good faith" affirmative defense was one of "credible evidence."[30]

We believe Oregon courts are more likely than not to use a "credible evidence" standard to show that a compensation differential is based on one of the bona fide factors listed in ORS 652.220 (2). Because of the lack of case law on this question, however, our opinion cannot be free from doubt.

Answer to Question 4

So long as an employer presents credible evidence that a pay differential is based on at least one of the bona fide factors listed under ORS 652.220 (2), and that the specifically cited factor is related, relevant, and applicable to the job in question, we believe a court is more likely than not to find the employer is not in violation of ORS 652.220 (1)(b).

Question 5: Does anything in Oregon law prohibit the legislature from creating a law that permits an employer to utilize a bona fide factor in good faith to pay an employee a different amount of compensation than another employee?

Answer: No. Employers had a "good faith" affirmative defense under the equal pay law until 2017.

As discussed under Question 4 above, until 2017, ORS 652.220 (2) provided an affirmative defense to employers to show that a differential in wages between employees was in "good faith."[31] The standard the courts used under the "good faith" affirmative defense was one of "credible evidence."[32] In other words, so long as an employer provided credible evidence of good faith, a court would not find the employer in violation of ORS 652.220 (1)(b).

We see nothing in the Oregon Constitution that would prohibit the Legislative Assembly from enacting legislation providing a good faith defense to employers that use a bona fide factor to pay an employee a different amount of compensation than other employees. Indeed, until 2017, ORS 652.220 (2) provided exactly that affirmative defense.

Question 7: Does anything in Oregon law prohibit the adoption of a provision like Washington's Equal Pay and Opportunity Act where the bona fide factor is "consistent with business necessity"? Or New York's provision where the bona fide factor "shall be job-related with respect to the position in question and shall be consistent with business necessity"?

Answer: No.

Question 9: Does anything in Oregon law prohibit the adoption of a provision like Hawaii's law that allows for a bona fide factor to include an occupational qualification?

Answer: No.

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[30] *See Bull Run School Dist.*, 80 Or. App. at 232 ("There is credible evidence which would support the conclusion that defendant proved its affirmative defense.").
[31] Section 2, chapter 197, Oregon Laws 2017.
[32] *See Bull Run School Dist.*, 80 Or. App. at 232 ("There is credible evidence which would support the conclusion that defendant proved its affirmative defense.").

Washington

In Washington, employers may not provide compensation that discriminates "in any way . . . based on gender between similarly employed employees."[33] The law provides an exception for, among other things, compensation that is

> based in good faith on a bona fide job-related factor or factors that:
> (i) Are consistent with business necessity;
> (ii) Are not based on or derived from a gender-based differential; and
> (iii) Account for the entire differential. More than one factor may account for the differential.
> (b) Such bona fide factors include, but are not limited to:
> (i) Education, training, or experience;
> (ii) A seniority system;
> (iii) A merit system;
> (iv) A system that measures earnings by quantity or quality of production; or
> (v) A bona fide regional difference in compensation levels.[34]

New York

New York likewise prohibits an employer from paying an employee

> with status within one or more protected class or classes . . . a wage at a rate less than the rate at which an employee without status within the same protected class or classes in the same establishment is paid for: (a) equal work on a job the performance of which requires equal skill, effort and responsibility, and which is performed under similar working conditions, or (b) substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.[35]

The law provides exceptions for, among other things, "a bona fide factor other than status within one or more protected class or classes, such as education, training, or experience."[36] The applicable bona fide factor:

> (A) shall not be based upon or derived from a differential in compensation based on status within one or more protected class or classes and (B) shall be job-related with respect to the position in question and shall be consistent with business necessity.[37]

New York defines "business necessity" as "a factor that bears a manifest relationship to the employment in question."[38]

Hawaii

Hawaii likewise prohibits discrimination

[33] Wash. Rev. Code sec. 49-58-020 (1).
[34] Wash. Rev. Code sec. 49-58-020 (3)(a) - (b) (emphasis added).
[35] N.Y. Labor Law sec. 194 (1).
[36] N.Y. Labor Law sec. 194 (1)(b)(iv).
[37] *Id.* (emphasis added).
[38] N.Y. Labor Law sec. 194 (2)(a).

> between employees because of sex, by paying wages to employees in an establishment at a rate less than the rate at which the employer pays wages to employees of the opposite sex in the establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and that are performed under similar working conditions.[39]

This prohibition does not extend to:

> (1) A seniority system;
> (2) A merit system;
> (3) A system that measures earnings by quantity or quality of production;
> (4) A bona fide occupational qualification; or
> (5) A differential based on any other permissible factor other than sex.[40]

Answers to Questions 7 and 9

Washington and New York both explicitly provide that "business necessity" constitutes a bona fide factor upon which an employer may base a compensation differential that would otherwise violate those states' equal pay laws. Hawaii explicitly provides that a "bona fide occupational qualification" is an exception to that state's prohibition against wage discrimination based on sex.

Restated for convenience, Oregon's bona fide factors are a seniority system, a merit system, a system that measures earnings by quantity or quality of production (including piece-rate work), workplace locations, travel (if necessary and regular for the employee), education, training, and experience. Each of these factors must be "related to the position in question." Arguably, the three states' specified exceptions for "business necessity" and "bona fide occupational qualification" may already fit, depending on specific circumstances, within Oregon's requirement that a pay differential must be based on at least one of the enumerated bona fide factors that are "related to the position in question." However, a pay differential that is based solely on "business necessity" or "bona fide occupational qualification" without also fitting within at least one of the other enumerated factors would not be sufficient to qualify as a bona fide factor that permits a pay differential.

We see nothing in the Oregon Constitution that would prohibit the Legislative Assembly from enacting language to provide greater clarity to the question. Such a determination would be one of policy preference.

Question 8: Does Oregon law have a similar provision related to career advancement like Washington's RCW 49.58.030?

Answer: Yes. Oregon, however, does not provide the same broad exception as Washington provides.

[39] Haw. Rev. Stat. sec. 378-2.3 (a).
[40] *Id*. (emphasis added).

Washington

Under Washington's Equal Pay and Opportunities Act, the legislature finds that "using gender as a factor in advancement contributes to pay inequity."[41] To that end, an employer "may not, on the basis of gender, limit or deprive an employee of career advancement opportunities that would otherwise be available."[42] But the law provides exceptions, which are the same as those provided for gender-based discrimination in compensation (*i.e.*, those exceptions that are "based in good faith on a bona fide job-related factor or factors").[43]

Oregon

In Oregon, an employer engages in an "unlawful employment practice" if the employer discriminates against an individual in compensation or in terms, conditions or privileges of employment

> because of [the] individual's race, color, religion, sex, sexual orientation, gender identity, national origin, marital status or age if the individual is 18 years of age or older, or because of the race, color, religion, sex, sexual orientation, gender identity, national origin, marital status or age of any other person with whom the individual associates, or because of [the] individual's juvenile record that has been expunged.[44]

BOLI expounds upon this prohibition under OAR 839-005-0021 by providing that employers

> are prohibited from using sex as the basis for employment decisions with regard to hiring, promotion or discharge; or in terms, conditions or privileges of employment such as benefits and compensation.[45]

Under the same administrative rule, sex may be considered a "bona fide occupational qualification" (BFOQ), but only in "very rare instances."[46] A BFOQ is not defined specifically, but an employer may prove one by showing "the BFOQ is reasonably necessary to the normal operation of the business" in order to show the discrimination is not unlawful.[47] To prove a BFOQ the employer must show:

> (a) A factual basis exists for believing that all or substantially all individuals in the protected class adversely affected by the BFOQ would be unable to perform safely and efficiently the tasks required in the job; or
> (b) It is impossible or highly impractical to screen applicants on an individual basis.[48]

Employers may not claim a BFOQ for:

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[41] Wash. Rev. Code sec. 49-58-030 (1).
[42] Wash. Rev. Code sec. 49-58-030 (2).
[43] Wash. Rev. Code sec. 49-58-020 (3)(a).
[44] ORS 659A.030 (1)(b).
[45] Emphasis added.
[46] OAR 839-005-0021 (3).
[47] OAR 839-005-0013 (1).
[48] *Id.*

(a) Customer, co-worker or employer preference;
(b) Stereotypes or assumed characteristics of a protected class.[49]

In summary, like Washington, Oregon prohibits using sex as the basis for employment decisions, including promoting an individual. Unlike Washington, however, Oregon does not provide as broad of an exception to the prohibition as Washington provides. Oregon's exception requires an employer to prove that sex as a basis for employment decisions must be a BFOQ that is "reasonably necessary to the normal operation of the business" as proved by showing a factual basis that the tasks performed in the job can be performed by members of one sex or the other or by showing that the employer cannot screen applicants on an individual basis because screening applicants is impossible or highly impractical. As the administrative rule itself states, sex may be a BFOQ in "very rare instances."[50]

III. Protected Classes

Question 10: Does anything in Oregon law prohibit the addition of the following protected classes:

a. country of ancestral origin
b. familial status
c. marital status
d. domestic violence status
e. predisposing genetic characteristics
f. citizenship status
g. immigration status
h. nationality
i. ancestry
j. pregnancy or breastfeeding
k. atypical hereditary cellular or blood trait of any individual

Answer: Likely no.

Discrimination Based on a Protected Class

Under ORS 652.220 (1)(a) an employer engages in an "unlawful employment practice" if the employer discriminates "in any manner . . . on the basis of a protected class in the payment of wages or other compensation for work of comparable character." A "protected class" is "a group of persons distinguished by race, color, religion, sex, sexual orientation, gender identity, national origin, marital status, veteran status, disability or age."[51] In short, employers may not discriminate among employees based the characteristics of those in a protected class who do the same type of job.

Typically, a law that applies with regard to certain classes of individuals implicates Article I, section 20, of the Oregon Constitution, which provides, "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." Only laws that disparately treat a "true class"—that is, a class that is "defined in terms of characteristics that are shared apart from the challenged law or action"—can

[49] OAR 839-005-0013 (2).
[50] OAR 839-005-0021 (3).
[51] ORS 652.210 (6).

violate Article I, section 20.[52] Where a true class exists, courts distinguish between "suspect" and "nonsuspect" true classes. A suspect true class, such as race or gender, is based upon immutable characteristics of members or consists of members who are the subject of past adverse prejudice. Depending on whether a true class is suspect or nonsuspect, courts will employ a correspondingly strict or lenient standard of review.[53] A true suspect class is subject to "a demanding level of judicial scrutiny."[54] However, if the challenged law or government action creates the class, the class is not a true class and a court would simply look to whether a rational basis exists for the creation of the class and would uphold the law if a rational basis exists.

In short, the level of deference that courts will provide for state laws that disparately treat individuals based on class depends on whether the individual is a member of a true class (either suspect or nonsuspect) or a nontrue class. The level of review a court would then use is, in order of decreasing level of strictness: suspect true class, nonsuspect true class, and nontrue class.

Time does not permit us to do a particularized review of the specific groups you list in your question to determine how a court would categorize them for purposes of protection under Article I, section 20. We note, however, that many of the groups you list in your question may already be among a protected class, as defined in ORS 652.210 (6).

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

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By
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[52] *Tanner v. OHSU*, 157 Or. App. 502, 520-521 (1998).
[53] *Id.* at 520-522.
[54] *Advanced Drainage Sys. v. City of Portland*, 214 Or. App. 534, 540 (2007).