

An Interview with Brad Avakian, Oregon’s Labor Commissioner

Brad Avakian was appointed commissioner of the Oregon Bureau of Labor and Industries (BOLI) in March 2008 and was elected to that position, also known as the labor commissioner, in November 2008. He met with members of this newsletter’s editorial board for an extensive interview on April 21, 2010. His responses have been paraphrased and edited for clarity.

What is the biggest challenge you have faced in your first two years as BOLI commissioner?

My biggest challenge has been figuring out an approach that will enable BOLI to provide improved services in the face of significant budget cuts. Even before the 2001 economic downturn, BOLI’s budget had been slashed as a result of earlier efforts to dismantle the agency. The number of employees declined from a high of 162 to a low a few years ago of 98. Most middle-management positions were eliminated, leaving upper-level administrators with virtually no support staff. The agency was faced with tough decisions about how to prioritize its minimal resources.

One area in which the cuts had the most obvious effect involved services to migrant farmworkers. BOLI used to have staff who would personally inspect the farmworker camps, but we now have one staff member who handles farmworker services for the entire state.

Happily, in the last legislative session, BOLI was able to avoid the significant cuts experienced by other agencies. The legislature maintained BOLI’s budget and provided increases

Corbett Gordon
Fisher & Phillips LLP

Dana Sullivan
Buchanan Angeli
Altschul & Sullivan LLP

in some areas. However, for the upcoming biennium, the legislature has asked all state agencies to present alternative budget-cut plans, based upon reductions of 10, 15, and 25 percent.

How do your 17 years of experience as a civil rights attorney and your time in the Oregon legislature inform your decisions as commissioner?

Before law school, I worked as a counselor and ran a treatment center for boys. I decided on law as a second career because I wanted to be a civil rights lawyer. I view my work as BOLI commissioner as an extension of the work that I did as a civil rights attorney in private practice. Every facet of the agency is designed to create fairness. My understanding of constitutional law and federal and state civil rights laws has been very helpful to me in my role as commissioner. My background and experience have enabled me to promote effective partnerships with administrators within the agency who are themselves experts in the areas they oversee.

As commissioner, my responsibilities include reviewing the recommendations of BOLI’s administrative law judges, making determinations about alleged violations of Oregon’s civil rights laws, and setting damages. My background as a trial lawyer is

helpful to me in carrying out these responsibilities. My mission in the legislature was similar to my mission as BOLI commissioner. My legislative experience has also proved beneficial to me in my new role because I have an understanding of the legislative and budget processes. Also, as a legislator I developed valuable relationships with other elected officials that still exist today.

Has BOLI seen any identifiable trends in the number of employee complaints filed or the bases for those complaints?

Most of the cases we see involve allegations of multiple discriminatory motives—gender, disability, etc. The volume of cases has been pretty steady since I joined the agency. If I had to identify an area in which there seems to have been an increase recently, it’s cases involving allegations of disability discrimination, which are coming in slightly more rapidly this year than usual.

It is also apparent to me that workers are aware of the passage of Oregon’s new law prohibiting discrimination on the basis of sexual orientation. Last year we had approximately 60 to 65 complaints filed on that basis. However, because BOLI has for a long time been responsible for enforcing

————— CONTINUED ON PAGE 6

◆ In This Issue

- Interview with Brad Avakian ...1
- Supreme Court Update2
- Medical Marijuana Policies3

Supreme Court Update

Decided

***Florida v. Powell*,
No. 08-1175
(Feb. 23, 2010)**

In this 7–2 decision, the United States Supreme Court reversed the Florida Supreme Court and held that a law enforcement officer's telling a suspect that he had the right to talk to a lawyer before answering the officer's questions, and that the suspect could invoke that right at any time during the interview, satisfies *Miranda*, which requires that a suspect be made aware of the right to an attorney during questioning. Although Powell, the suspect, was not specifically advised that his lawyer could be present during questioning, the Court held that the notification he was provided was sufficient to make him aware of his right to counsel during questioning.

***Graham v. Florida*,
No. 08-7412 (May 17, 2010)**

The U.S. Supreme Court reversed the ruling of the Florida Court of Appeals in this 6–3 decision, holding that a sentence of life in prison without parole for non-homicide crimes committed as a juvenile violates the Eighth Amendment's prohibition on cruel and unusual punishment. The Florida court upheld the conviction and true life sentence of Terrance Graham for crimes committed when he was 16 years old. After reviewing sociological and penological theory, as well as sentencing practices throughout the world, the Supreme Court was convinced that juvenile offenders should not be subject to life without parole for non-homicide offenses.

***Maryland v. Shatzer*,
No. 08-680 (Feb. 24, 2010)**

The Supreme Court unanimously reversed the Maryland Court of Appeals, holding that when two weeks or more elapse between an initial custodial interrogation at which a suspect invoked his *Miranda* rights, and a second interrogation at which he waived those same rights and

Kyle Busse
Busse & Hunt

made incriminating statements, the statements should not be suppressed.

***U.S. v. Stevens*,
No. 08-769 (April 20, 2010)**

In an 8–1 decision, the Supreme Court affirmed the Third Circuit Court of Appeals' holding that 18 USC § 48, which criminalized the commercial creation, sale, or possession of depictions of animal cruelty, was facially unconstitutional as a content-based restriction on free speech. Stevens, indicted under § 48 for selling videos featuring dogfighting, argued that the statute violated the First Amendment. The Court agreed, holding that § 48 was unconstitutionally overbroad in that it criminalized depictions of both legal and illegal activities, depending on the state in which the allegedly criminal acts occurred. The Court noted that although the prohibition on animal cruelty has a long history in American law, prohibitions on depictions of animal cruelty do not have the same tradition, and those depictions do not constitute a category of unprotected speech.

Certiorari Granted

***Snyder v. Phelps*,
No. 09-751 (March 8, 2010)**

The Court will hear this case out of the Fourth Circuit regarding whether anti-homosexual picketing at a deceased Marine's funeral, and the publication of anti-homosexual literature referencing the deceased Marine's family, are protected speech under the First Amendment. Snyder, the Marine's father, brought various tort claims against Phelps and his church. The Fourth Circuit reversed the district court's finding of liability on three of the claims, reasoning that Phelps's speech and publication were protected by the First Amendment. ♦

Kyle Busse is an associate of Busse & Hunt, which represents employees in employment cases, including civil rights, discrimination, and fraud.

OREGON CIVIL RIGHTS NEWSLETTER

EDITORIAL BOARD

MARC ABRAMS
AMY ANGEL
LOREN COLLINS
ANNE DENECKE
SEAN DRISCOLL
CORBETT GORDON
DAN GRINFAS
CARYN JONES
KATELYN OLDHAM
DANA SULLIVAN

EDITOR

EILISE GAUTIER

SECTION OFFICERS

AMY ANGEL, CHAIR
SALLY CARTER, CHAIR-ELECT
SARAH RADCLIFFE, SECRETARY
MARY ELLEN PAGE FARR, TREASURER
LOREN COLLINS, PAST CHAIR

EXECUTIVE COMMITTEE

ASHLEE ALBIES
THADDEUS BETZ
AKIN BLITZ
SEAN DRISCOLL
MARIANNE DUGAN
MEG HEATON
JOHN KODACHI
KEVIN LAFKY

OSB LIAISON

PAUL NICKELL

The Oregon Civil Rights Newsletter
is published by
the Civil Rights Section
of the Oregon State Bar
P.O. Box 231935
Tigard, Oregon 97281-1935

The purpose of this publication is
to provide information on current
developments in civil rights and
constitutional law. Readers are
advised to verify sources
and authorities.

 Recycled/Recyclable

[Back to page 1](#)

Advising Oregon Employers on Medical Marijuana Policies in the Wake of *Emerald Steel v. BOLI*

In a decision eagerly awaited by Oregon employers with drug-testing policies, the Oregon Supreme Court in *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industries*, 348 Or. 159 (April 14, 2010), finally ruled on the issue whether Oregon's disability laws require the state's employers to accommodate employees' use of medical marijuana. The court definitively answered no to that question. In the wake of this decision, different Oregon employers will have two distinctly different questions for their legal counsel.

Many employers will ask if they are now entitled to strictly enforce their zero-tolerance drug policies without exception and terminate any employee who tests positive for marijuana. The answer to this question is a straightforward yes. Plainly, the *Emerald Steel* decision authorizes an employer to terminate an employee for marijuana use, even if he is using marijuana to treat the symptoms of a disability and possesses a valid "registry identification card" (i.e., a medical marijuana card) under the Oregon Medical Marijuana Act (OMMA), ORS 475.300 to 475.346.

To date, however, most (if not all) of the articles discussing the decision's implications for employers have focused on that single issue, ignoring the more difficult question that legal counsel will confront: How do you advise a client who does not want to fire every employee who uses medical marijuana? Specifically, what policies should you advise such a client to adopt to ensure that it can retain productive employees with valid medical reasons for using marijuana, while simultaneously reserving the right to discipline employees who abuse their rights under the OMMA or whose marijuana use simply is not compatible with the client's operations?

Emerald Steel represents a major victory for employers, giving them the leeway to adopt whatever medical

Dan Webb Howard
Gleaves Swearingen Potter & Scott

marijuana policies are best suited to their particular circumstances. However, the triumphal pronouncement that Oregon employers are now "free to fire all medical marijuana users!"—basically the only insight most management-side law firms have provided to date in their articles analyzing the *Emerald Steel* decision—will not help employers who wish to adopt more flexible policies. Simply put, not every employer will want to adopt a policy that will compel it to terminate one of its most productive employees if it becomes aware that he is using medical marijuana.

With that in mind, this article summarizes the key points of the *Emerald Steel* decision and then explores how counsel should respond when a client asks, "Are we required to stop accommodating medical marijuana users?"

The Oregon Supreme Court's Decision

On April 14, the Oregon Supreme Court handed down its decision in *Emerald Steel*. The case involved an employee named Anthony Scevers who possessed a valid registry identification card under the OMMA. Scevers used marijuana to treat anxiety, panic attacks, nausea, vomiting, and severe stomach cramps, all of which substantially limited his ability to eat. He had tried multiple other prescription drugs to treat these symptoms of his condition, but none had proved effective.

In January 2003, Emerald Steel hired Scevers on a temporary basis as a drill press operator. While working for Emerald Steel, Scevers used medical marijuana one to three times a day, although never at work. Scevers did satisfactory work for Emerald Steel as a temporary employee, and Emerald Steel was considering hiring him on a permanent basis. Pursuant to Emer-

ald Steel's policies, however, Scevers would need to pass a drug-screening test as a condition of becoming a permanent employee.

Knowing this, Scevers told his supervisor that he had a medical marijuana card and currently used marijuana to treat the symptoms of a medical condition. He explained that no other medications were effective for his condition, and he showed the supervisor supporting documentation from his physician. One week later, Emerald Steel terminated his employment.

Scevers filed a complaint with the Oregon Bureau of Labor & Industries (BOLI), alleging that Emerald Steel violated § 659A.112 of the Oregon Revised Statutes, which requires an employer to "make reasonable accommodation" for the disability of an employee, unless doing so would impose an "undue hardship." BOLI filed formal charges against Emerald Steel on Scevers's behalf. In essence, BOLI claimed that Emerald Steel should have exempted Scevers's use of medical marijuana from its normal drug-screening rules as a reasonable accommodation for his medical condition.

Oregon's disability statutes would seem to compel that accommodation. Although those statutes state that employers have no obligation to accommodate employees "currently engaged in the illegal use of drugs," they also state that drug use is not "illegal" when "authorized under state law." The OMMA, an Oregon state law, explicitly authorizes the use of medical marijuana by people with valid medical marijuana cards. Therefore, most Oregon employers had concluded, with good reason, that they were obligated to exempt authorized medical marijuana users with disabilities from their drug-screening policies as a reasonable accommodation. Indeed, the Oregon Supreme Court observes in its

————— CONTINUED ON PAGE 4

opinion in *Emerald Steel* that it would be compelled to decide the case in Scevers's favor were it considering Oregon law alone.

Emerald Steel, however, asserted a defense based on federal law, arguing that the provision of the OMMA that authorizes the use of medical marijuana is preempted by the federal Controlled Substances Act, 21 USC § 801 et seq. The Oregon Supreme Court agreed.

A state law is preempted by federal law, and cannot be enforced, when it frustrates the objectives of a federal statute. The Oregon Supreme Court, observing that the federal Controlled Substances Act "prohibits the use of marijuana without regard to whether it is used for medicinal purposes," concluded that the provision of the OMMA that explicitly authorizes individuals to use medical marijuana frustrates the objectives of the Controlled Substances Act.

Therefore, the court held, the interacting provisions of the OMMA and the Oregon disability laws that would otherwise compel Oregon employers to accommodate medical marijuana use when it is the only effective treatment for an employee's disability are preempted by federal law. As the court flatly states toward the beginning of its opinion: "under Oregon's employment discrimination laws, [an employer is] not required to accommodate [an] employee's use of medical marijuana."

Medical Marijuana Policies After *Emerald Steel*

It is important to understand the limited scope of *Emerald Steel*. True, Oregon employers who have "zero tolerance" policies for drug use can now terminate, or refuse to hire, people who test positive for marijuana, regardless of whether they possess valid medical marijuana cards. Employers have no obligation to engage in the "interactive process" with such employees or applicants to try to find alternative accommodations. As

long as the employer's employment decision is based on a positive test for marijuana, it is lawful.

On the other hand, although the court held that the provision of the OMMA that affirmatively authorizes medical marijuana use is preempted by federal law, it also noted that the OMMA's provisions exempting medical marijuana users from criminal prosecution under state law are legitimate. As a result, many people will continue to seek medical marijuana cards to avoid prosecution by the state's law enforcement authorities, and many Oregon doctors will undoubtedly continue to provide those people with the documentation that they need to obtain medical marijuana cards.

In other words, *Emerald Steel* plainly does *not* signal the end of medical marijuana in Oregon. And, while employers clearly can abandon any medical marijuana accommodation policies they have established, some employers may not wish to do so. Consider the following hypothetical:

An employee with 15 years of exemplary service is diagnosed with cancer. The employee works in an office job that does not pose any particular safety risks. His cancer is treatable, but treatment involves regular chemotherapy sessions and medications that cause him to suffer intense nausea that can last for several days. The employee decides to continue working while receiving treatments. His employer is ecstatic because the employee is extremely productive and would be very difficult to replace.

For the first couple of weeks of treatment, the employee has trouble accomplishing his job tasks, as a result of almost debilitating nausea. However, shortly thereafter, he suddenly turns the corner and returns to being almost as productive as he was before he began his treatments. His supervisor innocently comments on this fact, and the

employee informs him that his nausea subsided when he began to use medical marijuana. He also tells his supervisor that his physician recommended medical marijuana only after determining that no other medication would effectively treat his symptoms. He states that he does not really like the "spaced out" feeling that he gets when he uses the drug, and plans to stop as soon as he finishes chemotherapy. In the meantime, however, marijuana is the only thing that allows him to function.

An employer with a strict "zero tolerance" policy that permits no exceptions for medical marijuana use would have no choice but to terminate this employee. Many employers, however, might not want to tie their hands in dealing with this type of scenario.

Most employers don't need to. For the most part, private employers have no obligation to enforce the drug laws on behalf of the federal government.¹ Consequently, most employers are not required to terminate or discipline employees who admit to medical marijuana use. Instead, they can maintain a medical marijuana exception to their substance abuse and drug-testing policies if they so choose.

However, counsel should advise any client that does choose to carve out such an exception to clearly notify its employees in a written policy that it is not obligated to provide the type of "reasonable accommodation" that would be required under Oregon's disability laws. The last thing that an employer wants to do is inadvertently commit itself to the legalistic process that Oregon's disability laws mandate for finding a "reasonable accommodation."

For example, under the Oregon disability laws, an employer must offer an available "reasonable accommodation" that would enable a disabled employee to continue performing the essential functions of

————— CONTINUED ON PAGE 5

his current job before it can consider transferring him to another position. An employer can avoid this obligation only by demonstrating that the accommodation at issue would impose an “undue hardship” on its operations or that the employee would pose a “direct threat” to his own safety or the safety of others if he continued working in the same position with the “reasonable accommodation” that enabled him to continue performing his essential job functions. There is limited guidance on what constitutes an “undue hardship,” and establishing a “direct threat” is a considerable burden, requiring objective medical evidence that the employee poses an “imminent” danger to himself or others.

Before *Emerald Steel*, these rules placed Oregon employers in a terrible situation. To take just one example, an employer may have very legitimate concerns about whether it is safe to keep an employee in a delivery driver position if he is currently using medical marijuana. Employers could prohibit medical marijuana users from being intoxicated during working hours even before *Emerald Steel*, but employees do not always strictly comply with the rules. Nonetheless, it is often difficult in this type of situation to prove that having the employee remain behind the wheel poses a “direct threat” to the public. After all, his physician in most cases will have authorized the employee’s use of marijuana with full knowledge of the nature of his work.

As a result, before *Emerald Steel*, employers in this type of situation faced the painful “lose-lose” choice of (a) removing the employee from his position and facing probable liability under Oregon’s disability laws or (b) leaving the employee in his position and tolerating an unacceptable safety risk to the public.

Emerald Steel removes this dilemma. When an employer is sympathetic toward a medical marijuana user’s situation, but leery of keeping

him in a safety-sensitive position, it has the option of transferring him—temporarily or permanently, as it deems appropriate—to any available position that does not raise similar safety concerns. That the position might constitute a demotion is of no event. Because the employer is entitled to terminate under *Emerald Steel*, it is also plainly permitted to take the lesser step of demotion. In light of the court’s decision, the employer will not have to deal with being second-guessed by an agency, court, or jury that might not appreciate the realities of its workplace. An employer will have the discretion to grant an accommodation that it deems appropriate—regardless of whether it would meet the definition of a “reasonable accommodation” under Oregon’s disability laws.

To ensure that the employer retains this level of discretion, and to prevent any contention that it has created an “implied contract” with its employees to follow the legalistic “reasonable accommodation” methodology mandated by Oregon’s disability laws, counsel should advise a client who elects to accommodate medical marijuana users to adopt a written medical marijuana policy that contains at least the following ten provisions. The policy should

1. Require the employee to notify his supervisor that he is using marijuana for medicinal purposes *before* he tests positive;
2. Be limited to employees who present proof of valid “registry identification cards” that authorize their use of medical marijuana;
3. Prohibit employees from bringing marijuana to work or possessing marijuana on the employer’s premises at any time;
4. Prohibit employees from reporting to work under the intoxicating influence of the drug;
5. Limit accommodations to employees who the employer determines, in its sole discretion, (a) remain able to perform the essential

functions of their current jobs effectively and safely or (b) can be transferred to another position that they can perform effectively and safely;

6. Alert employees that the employer reserves the right to transfer them to any other vacant position if it deems this to be the most appropriate accommodation in the circumstances (irrespective of whether the transfer would be a demotion);
7. Reserve the right to discipline if the employee uses or possesses marijuana in a manner that is inconsistent with his health care provider’s prescription, advice, or recommendations, the conditions imposed by his medical marijuana card, or Oregon law;
8. Specify that the employer will not permit an employee’s use of medical marijuana as an accommodation when the employer determines that offering or continuing such an accommodation might be inconsistent with an obligation imposed on the employer by federal law;
9. State that a medical marijuana accommodation will be offered only if the employee’s physician certifies that no other medication will effectively treat the employee’s symptoms; and
10. Specify that, although the employer will attempt to accommodate the employee’s medical marijuana use if the foregoing conditions are met, no accommodation is guaranteed. In other words, termination remains an option if the employer determines, in its sole discretion, that there is no current vacancy appropriate for a medical marijuana user.

These provisions will afford an employer considerable protection. Ultimately, however, each employer must weigh the risks of accommodating medical marijuana use against the potential benefits, in the context

————— CONTINUED ON PAGE 6

municipal laws prohibiting sexual orientation discrimination, I cannot say that there has been a sharp spike in the number of sexual orientation cases.

Interestingly, the economic downturn has not translated to a dramatic increase in the number of complaints filed generally, or the number of calls to the employer technical assistance line, although the size and number of claims on the wage security fund has increased significantly.

How have budget cuts affected BOLI, and what are your priorities and goals in that regard?

As I previously mentioned, BOLI was already struggling with the aftermath of budget cuts, well before the economic downturn. Substantial budget cuts and staff reductions had left investigators in BOLI's Civil Rights Division with caseloads ranging from 50 to 100 cases per investigator. During this last legislative session, four civil rights investigator positions were restored. BOLI has succeeded in filling those positions with highly experienced investigators.

The Civil Rights Division receives

between 30,000 and 32,000 calls per year from employees believing they may have been treated unlawfully. We have two people handling these intake calls, which result in about 1,900 to 2,200 complaints being filed with the Civil Rights Division each year. These complaints include employment, fair housing, and public accommodation cases. BOLI currently has 16 investigators in the Civil Rights Division. The Wage and Hour Division received approximately 25,000 calls last year. There were between 20,000 and 25,000 calls to the Technical Assistance for Employers line.

Technical assistance for employers had been virtually defunded due to repeated cuts to BOLI's budget. This made it difficult to provide high-quality seminars in all parts of the state, despite the demand. In the 2009 legislative session, we succeeded in attaining funding for two new positions in the Technical Assistance Unit. We will now have four people working in that unit. My goal is to eliminate fees for handbooks and seminars, so that the information is readily available to all employers.

What is your assessment of the Civil Rights Division's complaint investigation process? What steps have you taken to accomplish your goal to improve the process?

Our investigators do a very good job. Capacity was expanded once the legislature funded additional investigators, permitting quicker determinations, the earlier dismissal of meritless claims, and the exploration of a broader range of evidence in the course of the investigation.

When I became labor commissioner, investigators coped with their high caseloads by focusing on direct evidence, as it was perceived as being stronger. I have counseled our investigators to look also at circumstantial evidence in reaching a conclusion. This policy has been implemented.

The Civil Rights Division is currently looking at ways to not only dismiss insufficient cases sooner—to spare employers the interruption and expense of defense—but also to settle fewer of the meritorious cases and, instead, to take them to hearing. In part, it is important to do this to develop the

————— CONTINUED ON PAGE 7

of the specific environment in which the employer operates. Employers in industries involving the use of particularly dangerous equipment might decide that, on the whole, following a strict "zero tolerance" policy is the better approach.

As with any employment policy, adopting general guidelines for making employment decisions, in lieu of hard-and-fast rules, raises the prospect of differential treatment. Therefore, counsel should caution any client who adopts a medical marijuana policy containing the above-referenced provisions that it must be vigilant in ensuring that its supervisors and human resources personnel apply the policy consistently and equitably. Plainly, applying the policy differently

between the different sexes, or among different races, would be much worse than enforcing a true "zero tolerance" policy that held every employee to the same simple and strict consequence—namely, that one positive test result equals termination of employment.

Conclusion

Regardless of an employer's particular views on the appropriateness of accommodating medical marijuana use, *Emerald Steel* represents a victory for employers. Employers who are so inclined can now strictly enforce their "zero tolerance" substance abuse policies, without having to make any exception for employees who use medical marijuana to treat symptoms of disabilities. However, it

seems likely that not every employer will want to take such a strict, unyielding approach. Consequently, in the wake of *Emerald Steel*, legal counsel should also be prepared to advise employers on the essential provisions of any medical marijuana accommodation policy that they choose to maintain. ♦

Dan Webb Howard is a partner at Gleaves Swearingen Potter & Scott, in Eugene, where he maintains an appellate practice and represents employers in employment law matters.

1. There are some notable exceptions. For example, employers subject to the U.S. Department of Transportation's detailed Federal Motor Carrier Safety Regulations often have no choice but to terminate an employee who tests positive for an illicit substance.

body of case law decided by BOLI. We maintain a digest of precedent that is relied on by our own administrative law judges, is cited by the courts, and is helpful in interpreting the law. It is important to ensure that enough cases with merit continue to hearing to expand this body of interpretive case law.

I also want to make awards in cases in which the complainant prevails in the administrative hearing process more commensurate with state and federal verdicts in comparable cases. We had two civil rights cases within the last year that have gone to hearing and on which I issued orders for the complainant: one for \$50,000 and one for \$125,000. Both were sexual harassment cases.

I want to ensure both that the damages available through our process are sufficient to stop employers that are violating the law and that we dismiss meritless cases quickly to avoid inconvenience to good employers that are following the law.

Also, BOLI took in about 200 new housing cases within the last two years because of our relationship with federal enforcement authorities. We are actively and aggressively enforcing discrimination laws in housing. We provide continuing education for our investigators in handling housing cases and are sending some for federal training.

Is there any oversight in place to ensure evenhanded investigations?

Yes, every investigation and resulting determination is reviewed by the unit administrators before any determination is issued on a case. Additionally, our investigators are trained and counseled to see themselves as truth seekers, not advocates for either party.

In the past few legislative sessions, BOLI has sponsored a good deal of employment-related legislation that has been enacted. What other legislation would you like to see the legislature consider in future sessions?

We have a list of 30 or more changes we are considering. It is an ambitious agenda. Among our ideas is a change to ensure that the issuance of a 90-day right-to-sue notice after a BOLI dismissal does not shorten the one-year statute of limitations that would apply had the employee not chosen to file with BOLI.

We are also looking at a provision that would allow BOLI to award fees to attorneys advising complainants through the contested case hearing process. It would also provide for the award of attorneys' fees to a prevailing respondent if the complainant's claims lacked any reasonable basis. As things currently stand, the only way for a complainant to recover attorneys' fees in addition to whatever relief may be awarded is to pull the claim from our process and take it to court. This makes the process that is designed to be cheaper and faster for all concerned drag on longer, perhaps, than if the attorney had taken it to court at the outset.

We want the ability to award fees to streamline the process for both the employer and the complainant and not lose the benefit of our investigative work. The attorney would keep track of hours and, if the complainant were successful, BOLI would award fees for time the attorney spent in assisting the complainant through our system. Defense attorneys representing employers are paid for their work in this regard. Further, if there were a finding that there was not a "reasonable basis" for the complainant to file, there would be an option for an employer to recover attorneys' fees. Of the last 8 to 10 cases in which I signed orders, I would have considered defense fees in two.

Another one of BOLI's legislative priorities is to seek the authority to hold default hearings. Sometimes a respondent employer fails to appear at a hearing or to file any response to the initial charge. The process is complicated for the Hearings Unit, as well as for the investigation, when there is

no access to the employer's side of the facts underlying a matter. We have no power to prevent a complainant from requesting a right-to-sue letter to take a case to court, but we are trying to build in incentives to have the case stay with us through hearing. We need some incentive to encourage an employer to participate as well.

Our Wage and Hour Division will likely seek the ability, which currently exists in the Civil Rights Division, to issue a cease-and-desist order for an employer to stop repeated illegal conduct. And we are looking at warrant and garnishment authority to allow us to enforce our orders without having to go to the state circuit court or another agency for that ability. Some other state agencies, like the Department of Revenue, currently have the ability to garnish wages, take property, or freeze an account, and it makes sense in some cases for BOLI to be able to do that as well, without the extra step of going to court or another agency first to enforce our own orders.

What are your top priorities for BOLI during the rest of your term?

As I explained, it is a priority both to expand our authority, so that we can be more effective, and to continue to maintain appropriate staff to handle the 2,200 formal complaints made to our Civil Rights Division every year.

In addition, I plan to employ the rarely used, but powerful, existing authority to file a commissioner's complaint when there is a problem and no individual complainant has come forward to seek redress. A commissioner's complaint is sometimes needed in cases against public bodies when individual employees are too fearful to pursue their rights or the case presents issues of a broader social concern. BOLI needs to be sensitive to the fact that it is the only state agency with jurisdiction over the operation of other state agencies.

I also see a need for commissioner's

————— CONTINUED ON PAGE 8

complaints to ensure equal access to public accommodations for all Oregonians. As an example, there are currently eight neo-Nazi white supremacist groups in the state that prevent some of our citizens from using stores and accessing churches and other areas of public accommodation. These groups can be prosecuted under our public accommodations law.

Finally, the Urban League's recently published *State of Black Oregon* identifies areas where there may be discrimination occurring in public accommodations that has gone on for years. BOLI will work with groups like the Urban League across the state to address broad social issues that affect the civil rights of our citizens.

What are the accomplishments during your time as BOLI commissioner of which you are most proud?

The creation of the Oregon Council on Civil Rights was an important step for Oregon, and I am excited about the work it is doing and will do to advance the civil rights of all Oregonians. The members of the Council bring a great depth and diversity of experiences to their work, which will be very helpful to the state in tackling some thorny issues.

BOLI took on and clarified the meal- and rest-break rules for the state. This was a complex undertaking and one that has caused other states much grief. However, the task force we put together was successful in clarifying the regulations, including carve outs for industries that require them. This is one of the most difficult, political policy tasks I have ever taken on, and I am proud of our successful results.

We have reformed the way in which we conduct prevailing-wage-rate surveys with employers. This should be an improvement for workers in the amount of money paid for labor on public projects, but it is also a victory for contractors because the data collection process will be less burdensome. The new, simpler survey also reflects a fairer way for the government and contracting businesses to pay, creating a more predictable and more stable system for contractors to use in bidding jobs. The new survey goes into effect in July.

In addition, our awards for damages are higher than they have been historically, and we have been able to clear our backlog of cases, which is a significant accomplishment. We have also been able to find over \$300,000 in administrative efficiencies, which has enabled us to invest more in our enforcement and education duties. Of course, the \$7 million that BOLI won for wage claimants and civil rights complainants during the 2007–09 biennium was also a great accomplishment.

Are there things that BOLI offers workers in Oregon that are different than those offered by the civil rights arm of the attorney general's office?

Yes. Both are important. The AG's office works with district attorneys to bring civil rights violators to justice in the criminal court system. BOLI enforces civil penalty laws to

Oregon State Bar
Civil Rights Section
P.O. Box 231935
Tigard, OR 97281-1935

ensure that employees and invitees receive equal treatment, and BOLI can award unlimited non-economic damages and economic damages, and issue cease-and-desist orders and, in some cases, civil penalties. The AG's office does not have jurisdiction over public access or employment cases. Working together, both offices cover the scope of civil rights enforcement. It is important for members of the public to understand which agency can help with a particular problem to avoid missing the applicable statute of limitations to file a claim.

Is there a question you would like to ask and answer?

I would like to give your readers some insight into the way I conceive of the progress of civil rights in Oregon. As I see it, there are various groups that are working on civil rights issues in the state, including BOLI, the plaintiff's and defense bars, and advocacy groups. In my view, the efforts of any of these groups, working alone, are insufficient to advance civil rights for citizens. There are many opportunities for important partnerships between these groups. For example, I have established the Oregon Council on Civil Rights to create a vision for civil rights in Oregon. The 25 members of this board have undertaken an analysis of civil rights enforcement and education in the state. Once they have completed this task, I have charged them with taking on the question of equal pay for equal work, the lack of which remains a fundamental barrier to women in the workplace. Part of the council's job is to bring diverse groups together with a common direction for the progress of civil rights in Oregon. ♦

Corbett Gordon, senior counsel in the Portland office of Fisher & Phillips LLP, has represented employers in labor and employment matters since 1982. Dana Sullivan, a partner in Buchanan Angeli Altschul & Sullivan LLP, has represented individuals in employment and civil rights litigation since 1995.