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16 IN THE CIRCUIT COURT FOR THE STATE OF OREGON FOR MARION COUNTY

17 **ALEC ESQUIVEL,**

18 Plaintiff/Petitioner,

19 vs.

20 **STATE OF OREGON,** by and through
21 the **OREGON JUDICIAL**
22 **DEPARTMENT, COURT OF**
23 **APPEALS, and PUBLIC**
24 **EMPLOYEES' BENEFIT BOARD,**

25 Defendant,

26 and

PUBLIC EMPLOYEES' BENEFIT
BOARD,

Respondent.

CASE NO. _____

COMPLAINT

(Violation of O.R.S. 659A.030 and O.R.S. 174.100(6) - Discrimination on the Basis of Gender Identity; Judicial Review of PEBB Order)

NOT SUBJECT TO
MANDATORY ARBITRATION

Plaintiff/Petitioner alleges as follows:

1.

This case is about a State of Oregon (also, the "State") employee whom the State categorically excludes from employee health insurance coverage for medically necessary care because of his gender identity, where the State routinely insures the same medical care for employees based on

1 other reasons of medical necessity. The State, through its Insurance Division of the Oregon
2 Department of Consumer & Business Services, already has taken the position that private
3 insurers violate state antidiscrimination law in these circumstances, and Plaintiff/Petitioner seeks
4 redress for the same discrimination as a State employee.

5 2.

6 At all material times, Plaintiff/Petitioner Alec Esquivel was and is a resident of the County of
7 Multnomah and the State of Oregon. Jurisdiction is proper in this Court pursuant to O.R.S.
8 § 14.030 because the Court has jurisdiction of the parties, and pursuant to O.R.S. § 183.484 for
9 judicial review of a final decision of Respondent Public Employees' Benefit Board. Venue is
10 proper pursuant to O.R.S. § 14.060 because the cause of the suit arose in Marion County, where
11 Alec Esquivel was and still is employed.

12 3.

13 At all material times, the State, by and through the Oregon Judicial Department, Court of
14 Appeals ("OJD") was and still is Alec Esquivel's employer. OJD is a division of the State, and
15 is located at 1163 State Street in the City of Salem and County of Marion. The State, by and
16 through OJD, is an employer within the meaning of O.R.S. §§ 659A.001(4), 659A.001(9)(b),
17 30.260(4)(a), 30.260(5)(a), 174.109, and 174.111 because the State, by and through OJD, is a
18 public, state government body, that engages or uses the personal service of employees and
19 reserves the right to control the means by which such services are performed.

20 4.

21 At all material times, Respondent Public Employees' Benefit Board ("PEBB") was and still is a
22 division of the Defendant State of Oregon. Through PEBB, the State administers state employee
23 health insurance plans by selecting, negotiating the terms of, and contracting for such plans.
24 Pursuant to O.R.S. § 243.135, the State, through PEBB, must contract for health insurance plans
25 best designed to meet the needs and provide for the welfare of eligible employees and the state,
26 and must place an emphasis on, *inter alia*, employer flexibility in plan design and contracting,

1 plan benefits as part of total employee compensation, and the improvement of employee health.
2 At all material times, the State acted as Alec Esquivel’s employer by and through the Public
3 Employees’ Benefit Board (“PEBB”).
4

5 **First Claim for Relief**
6 **Against Defendant State of Oregon, By and Through**
7 **The Oregon Judicial Department, Court of Appeals**
8 **(Violation of O.R.S. § 659A.030(1)(b); O.R.S. § 174.100(6)**
9 **Gender Identity Discrimination)**

10 5.

11 On or about August 15, 2009, Alec Esquivel began employment with the State as a Law Clerk
12 for OJD at the Court of Appeals. In this capacity, Alec Esquivel has and continues to work for
13 the State in Marion County.

14 6.

15 Alec Esquivel’s work has been, and continues to be, well-received and Alec Esquivel is a valued
16 employee of the Court of Appeals.

17 7.

18 As compensation for, and as a term, condition or privilege of employment, the State provides to
19 employees, including Alec Esquivel, the opportunity to participate in one of several health
20 insurance plans, including the self-insured “Statewide Plan” (Group #108601) for State
21 employees administered by Providence Health Plans (“Providence”) on behalf of PEBB, (“the
22 Plan”). Because the Plan is self-insured, the State retains control over developing, formalizing
23 through contract, and administering the terms under which particular types of medical care will,
24 and will not be, insured through the Plan.

25 8.

26 Alec Esquivel enrolled for health coverage in the Plan at the beginning of his employment, and
he continues to receive insurance coverage through the Plan.

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9.

Gender identity is a deeply-rooted, internal psychological identification as male or female. Contemporary medical knowledge, and the consensus among experts in the field, indicates that gender identity cannot be changed, and that attempts to change a person’s gender identity are futile and unethical.

10.

Although Alec Esquivel was assigned the sex of female at birth, he has a strong, consistent and deeply-rooted male gender identity.

11.

In 2001, Alec Esquivel was diagnosed with Gender Identity Disorder (“GID”), sometimes known as gender dysphoria or transsexualism.

12.

GID is a recognized, serious medical condition identified in the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. Text Revision 2000) (“DSM-IV”).

13.

The DSM-IV’s diagnostic criteria for GID include a strong and consistent cross-gender identification and a persistent discomfort with one’s anatomical sex, causing clinically significant distress or impairment.

14.

The World Professional Association for Transgender Health (“WPATH”) is the leading professional association for surgeons, doctors, medical researchers and others who specialize in the medical treatment of people with GID.

15.

Based on decades of clinical experience and research, WPATH has promulgated medical standards of care for treating patients with GID.

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16.

The WPATH Standards of Care for Gender Identity Disorders (“Standards of Care”) recognize that treatment is medically necessary for most people with GID. The Standards of Care provide for an individualized assessment of medically necessary treatment for GID. The components of treatment may include the administration of hormone therapy; the “real-life experience” (living full-time presenting in the gender corresponding with the person’s gender identity); and sex reassignment surgery.

17.

WPATH has issued clarifying guidance to confirm that the professional consensus about the psychiatric, psychological, medical and surgical management of GID is that, for some transgender individuals, a “complete hysterectomy” (including removal of the uterus, fallopian tubes, cervix, and ovaries) is a medically necessary sex reassignment surgery, and in those circumstances, the surgery cannot be understood as cosmetic, elective or optional.

18.

Alec Esquivel’s doctors have confirmed that a hysterectomy and oophorectomy (removal of ovaries) are medically necessary for him to reduce health risks he has suffered and will continue to suffer in the absence of the procedure, and to align his body with his deep-seated gender identity as a male.

19.

After Alec Esquivel was diagnosed with GID in 2001, he began receiving medically necessary treatment to help him transition to the sex consistent with his gender identity, in accordance with the WPATH Standards of Care. Alec Esquivel underwent a bilateral mastectomy procedure, and as an ongoing part of his treatment, Alec Esquivel receives hormone replacement therapy (“HRT”) in the form of weekly injections of the masculinizing hormone, testosterone. HRT often is medically necessary for an individual with GID to live successfully in accordance with

1 his or her gender identity, and is a critical part of Alec Esquivel’s gender expression as a male.
2 Alec Esquivel has consistently lived as a man since he started his transition in 2001.

3 20.

4 Between 2001 and 2010, Alec Esquivel wished to continue his full transition with a
5 hysterectomy and oophorectomy, but he was unable to pay for it.

6 21.

7 Throughout this period, Alec Esquivel experienced increasing anxiety, distress, and loss of sleep
8 from the incongruity between his deeply felt gender identity, which was now fully outwardly
9 expressed as male, and his internal female reproductive organs. In addition to this psychological
10 distress, the annual gynecological exams he had to endure caused Alec Esquivel severe
11 discomfort and emotional pain.

12 22.

13 On February 19, 2010, Alec Esquivel had a medical appointment with Dr. Carol Blenning, a
14 family practice physician, at the Oregon Health & Science University, Family Medicine at
15 Richmond clinic. Dr. Blenning examined Alec Esquivel and concluded that a hysterectomy and
16 oophorectomy were medically indicated and are medically necessary treatments for his GID.

17 23.

18 Dr. Blenning indicated that these procedures are medically necessary for several reasons,
19 including to prevent a serious risk of ovarian and uterine cancer. Additionally, because ovaries
20 produce estrogen, Alec Esquivel must receive elevated doses of testosterone for the HRT to have
21 an adequately masculinizing effect. These elevated doses carry health risks, including but not
22 limited to high blood pressure, high cholesterol and potential liver conditions. Dr. Blenning
23 concluded that an oophorectomy is medically necessary to allow Alec Esquivel to reduce his
24 testosterone dosage and thereby reduce the health risks of maintaining a higher dose.
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24.

Removal of the female reproductive organs also is very important for Alec Esquivel’s overall mental and physical health because continuing to live with organs that are not aligned with his gender identity causes psychological distress, in addition to necessitating annual exams that are extremely physically uncomfortable, painful and difficult for him.

25.

Dr. Blenning referred Alec Esquivel to Dr. Elizabeth Newhall, a prominent obstetrician and gynecologist in Portland to perform the hysterectomy and oophorectomy surgery.

26.

On April 26, 2010, Dr. Newhall examined Alec Esquivel and formulated a surgical plan. Dr. Newhall then submitted a request for insurance coverage to the State, by and through PEBB and its third-party administrator Providence. She indicated through codes on the request form that the procedures were required for reasons related to Alec Esquivel’s gender identity.

27.

In a letter dated June 21, 2010, the State, by and through PEBB, denied the request for coverage through correspondence from its third-party administrator, Providence, stating, “[s]ervices related to a sex-change operation, including evaluation, surgery and follow-up services are not a covered benefit of your plan.”

28.

The Plan’s Member Handbook, adopted on January 2, 2010, states on page forty-three that the Plan categorically excludes “all Services related to sexual disorders or dysfunctions regardless of gender, including all Services related to a sex-change operation, including evaluation, surgery and follow-up Services.” The Plan’s current Member Handbook, which revises the Plan’s coverage effective April 1, 2011, contains an identical categorical exclusion of coverage.

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29.

Two other health plans are available to full-time State employees such as Alec Esquivel, including a Kaiser Permanente HMO Full-Time Plan and a Providence Choice Plan. Both plans contain a similar exclusion of medical treatment related to one’s gender identity. Alec Esquivel thus has no health insurance option through his employer that allows non-discriminatory access to his medically necessary hysterectomy and oophorectomy procedures.

30.

The State, by and through PEBB, routinely insures medically necessary hysterectomy and oophorectomy procedures sought by other State employees when they are indicated for reasons other than participants’ gender identity.

31.

In a letter dated December 21, 2010 upholding the denial of insurance coverage to Alec Esquivel, Providence confirmed on behalf of the State and PEBB that “[a] hysterectomy is covered for treatment of a uterine leiomyoma; recurrent abnormal uterine bleeding refractory to medical therapy or surgical intervention; incapacitating dysmenorrhea or pelvic pain refractory to medical management; endometriosis; pelvic inflammatory disease, cancer in situ, adenocarcinoma; in conjunction with a vaginal repair of cystocele, rectocele or enterocele; or symptomatic uterine prolapsed.”

32.

The same letter verified that the denial of coverage to Alec Esquivel is based on the blanket restriction of coverage for medically necessary treatment related to one’s gender identity, and thus is because of Alec Esquivel’s gender identity. The letter stated that the “primary reason for [Alec Esquivel’s] hysterectomy and bilateral oophorectomy [is] for the purpose of completing the transition to a male gender and not for any of the reasons outlined above,” and thus the requested procedures fall within the Plan’s exclusion.

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33.

Since 2007, Oregon law has prohibited discrimination in the terms of employment, including employee health insurance coverage, based on gender identity. O.R.S. § 659A.030(b); O.R.S. § 174.100(6). Alec Esquivel requested insurance coverage for procedures that are routinely covered for other Plan participants. The only factor that distinguishes Alec Esquivel from others who receive this coverage is that Alec Esquivel requires the care based on his gender identity.

34.

The hysterectomy and oophorectomy procedures that are medically necessary for some transgender individuals based on their gender identity, including Alec Esquivel, are not different in any material way from the hysterectomy and oophorectomy procedures necessary to treat the conditions confirmed as covered in PEBB’s December 21, 2010 letter.

35.

Aside from the discriminatory, blanket exclusion for health care based on gender identity in the Plan, the procedures Alec Esquivel seeks would qualify for coverage under the terms of the Plan. The Plan covers “medically necessary” care, and Alec Esquivel’s hysterectomy and oophorectomy procedures fall within the guidelines in Section 3.6 of the Plan’s Member Handbook for such care, including the following:

35.1 “All medical Services that are appropriate and necessary for the diagnosis and treatment of symptoms, illness, disease, injury or condition that is harmful or threatening to Your life or health;”

35.2 “Services that are within the standard of good medical practice within the organized medical community;”

35.3 “Services at the most appropriate level that can safely be provided;”

35.4 Services that are not “primarily for Your convenience or the convenience of Your Provider, Hospital, or any other health care provider” (such as staying “an extra day in the

1 Hospital only because the relative who will help You during recovery cannot pick You up until
2 the next morning”).

3 36.

4 The Plan further defines “Medically Necessary” care in Section 15 to include the following:

5 36.1 The Service is medically indicated according to the following factors:

- 6 A. The Service is necessary to diagnose or to meet the reasonable health needs of
7 the Member;
- 8 B. The expected health benefits from the Service are clinically significant and
9 exceed the expected health risks by a significant margin;
- 10 C. The Service is of demonstrable value, and that value is superior to other
11 Services and to the provision of no Services; and
- 12 D. Expected health benefits can include:
 - 13 i. Increased life expectancy;
 - 14 ii. Improved functional capacity;
 - 15 iii. Prevention of complications; or
 - 16 iv. Relief of pain.

17 36.2 The Qualified Practitioner recommends the Service.

18 36.3 The Service is rendered in the most cost-efficient manner and type of setting
19 consistent with nationally recognized standards of care, with consideration for potential benefits
20 and harms to the patient.

21 36.4 The Service is consistent in type, frequency and duration with scientifically based
22 guidelines of national medical, research, or health care coverage organizations or governmental
23 agencies that are accepted by the Plan.

24 37.

25 The hysterectomy and oophorectomy procedures requested by Alec Esquivel are medically
26 necessary within the Plan’s definition.

1 37.1 They are appropriate and necessary to reduce the serious health risks of ovarian
2 and uterine cancer associated with Alec Esquivel’s continuing to have female sex organs,
3 including a uterus and ovaries, while receiving ongoing HRT, and the significant health risks
4 associated with the elevated testosterone doses Alec Esquivel must take while still living with a
5 uterus and ovaries, including but not limited to high blood pressure, high cholesterol and
6 potential liver conditions.

7 37.2 These expected health benefits are clinically significant and significantly exceed
8 the minimal risks involved in a hysterectomy and oophorectomy procedure.

9 37.3 Hysterectomy and oophorectomy procedures are within the standard of good
10 medical practice within the organized medical community, as recognized by WPATH’s
11 clarifying guidance to its authoritative and definitive Standards of Care, which confirms the
12 nationally recognized standards of care and professional consensus that for some transgender
13 individuals a hysterectomy and oophorectomy are medically necessary procedures for the
14 treatment of GID.

15 37.4 The same guidance clarifies that the procedures cannot be understood in these
16 circumstances as cosmetic, elective or optional, and thus the procedures are not primarily for
17 Alec Esquivel’s convenience.

18 37.5 As a qualified practitioner, Dr. Blenning recommended this treatment, consistent
19 with the scientifically based guidelines for such care. Alec Esquivel’s request to have the
20 procedures performed by a qualified surgeon such as Dr. Newhall are at the most appropriate and
21 cost-efficient level that safely can be provided.

22 38.

23 Alec Esquivel appealed the Plan’s denial of coverage to the Providence Health Plans Appeals
24 and Grievance Department on December 15, 2010 and again on February 2, 2011, and then
25 appealed to the Plan’s Grievance Committee on April 4, 2011, in accordance with PEBB’s
26 specified appeal procedures. Each of these appeals was denied.

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39.

The last of these denials was made in a letter from the Grievance Committee dated April 29, 2011. The letter stated that it was the “final” decision of the agency.

40.

The State’s repeated, considered, and knowing decisions to deny him the same benefits and privileges of employment that it provides to other State employees, solely on the basis of his gender identity, caused Alec Esquivel further emotional distress, anxiety, and loss of sleep.

41.

On February 15, 2011, Alec Esquivel filed an employment discrimination complaint with the Bureau of Labor and Industries (“BOLI”) against, *inter alia*, the State, by and through OJD and PEBB. On June 10, 2011 Alec Esquivel withdrew from that administrative process and timely filed this complaint within 90 days of BOLI’s mailing of a 90-day notice.

42.

Alec Esquivel duly complied in a timely manner with the notice requirements of the Oregon Tort Claims Act by sending a notice of his claims against the State, by and through OJD and PEBB, which was received by the State on December 16, 2010, within the required 180 day period. O.R.S. § 30.275.

**First Claim For Relief, Count One
Disparate Treatment**

Alec Esquivel realleges the allegations set forth in paragraphs 1 through 42 above and incorporates them by reference as if fully set forth herein.

43.

The State, by and through OJD and PEBB, has been continuously discriminating against, and continues to discriminate against, Alec Esquivel in compensation and in the terms, conditions or privileges of his employment because of his gender identity by excluding him from insurance

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coverage for care that is routinely provided to other Plan participants, solely on the basis of Alec Esquivel’s gender identity. The Plan’s blanket exclusion of gender identity-related care denies to a specific, targeted group the care that is uniquely required by those, such as Alec Esquivel, whose “gender identity, appearance, expression or behavior differs from that traditionally associated with the individual’s sex at birth.” O.R.S. § 174.100(6).

44.

The continuing failure of the State, by and through OJD and PEBB, to cover Alec Esquivel’s medically necessary procedure, despite full knowledge of these actions and their basis, is intentional disparate treatment based on gender identity, in violation of O.R.S. § 659A.030(1)(b) and O.R.S. § 174.100(6).

45.

As a result of the State’s discriminatory denial of insurance coverage, Alec Esquivel has suffered and will suffer in the future economic losses because of increased health care costs. The amount of these losses are unknown at this time and this Complaint will be amended before trial to set forth the amounts.

46.

As a result of the State’s failure to cover his medically necessary procedures, Alec Esquivel has suffered adverse health effects and adverse health risks. As a further result of the State’s discrimination Alec Esquivel has suffered emotional distress, loss of dignity, anxiety, humiliation, and loss of enjoyment of life. These adverse consequences entitle Alec Esquivel to an award of compensatory damages in the amount of \$250,000.

47.

As a result of the State’s discriminatory actions, Alec Esquivel is entitled to an award of his reasonable attorney fees and costs pursuant to O.R.S. § 659A.885.

**First Claim for Relief, Count Two
Disparate Impact**

Alec Esquivel realleges the allegations set forth in paragraphs 1 through 47 above and incorporates them by reference as if fully set forth herein.

48.

The State’s exclusion from coverage for “all Services related to sexual disorders or dysfunctions regardless of gender, including all Services related to a sex-change operation, including evaluation, surgery and follow-up Services” has a disparate impact on transgender employees such as Alec Esquivel because it has the effect of denying medically necessary care to transgender employees at a significantly higher rate than non-transgender employees. Transgender employees therefore do not enjoy the same privileges of employment that other state employees receive.

49.

As a result of the State’s discriminatory denial of insurance coverage, Alec Esquivel has suffered and will suffer in the future economic losses because of increased health care costs. The amount of these losses are unknown at this time and this Complaint will be amended before trial to set forth the amounts.

50.

As a result of the State’s failure to cover his medically necessary procedures, Alec Esquivel has suffered adverse health effects and adverse health risks. As a further result of the State’s discrimination Alec Esquivel has suffered emotional distress, loss of dignity, anxiety, humiliation, and loss of enjoyment of life. These adverse consequences entitle Alec Esquivel to an award of compensatory damages in the amount of \$250,000.

51.

As a result of the State’s discriminatory actions, Alec Esquivel is entitled to an award of his reasonable attorney fees and costs pursuant to O.R.S. § 659A.885.

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**Second Claim for Relief
Against Respondent Public Employees' Benefit Board
(Judicial Review of Order of PEBB)**

Alec Esquivel realleges the allegations set forth in paragraphs 1 through 51 above and incorporates them by reference as if fully set forth herein.

52.

The final decision of PEBB's Grievance Committee to uphold the denial of coverage to Alec Esquivel based on his gender identity, reflected in the April 29, 2011 correspondence from PEBB's Grievance Committee described above, constitutes a final order ("Order").

53.

Alec Esquivel has filed this petition in the Circuit Court of Marion County within sixty days of the date of service of the Order, to obtain judicial review of the Order pursuant to O.R.S. § 183.484.

54.

Alec Esquivel duly complied in a timely manner with the notice requirements of the Oregon Tort Claims Act by sending a notice of his claims against PEBB, which was received by the State on December 16, 2010, within the required 180 day period. O.R.S. § 30.275. The State has knowingly and intentionally ratified its actions by and through PEBB by, for example, sending a responsive letter to Alec Esquivel dated January 26, 2011 finding "[n]o liability" on the part of the State and denying Alec Esquivel's claims.

55.

Alec Esquivel sought, and through PEBB's Order has been denied, insurance coverage for a medically necessary hysterectomy and oophorectomy for treatment of his gender identity, procedures that are routinely provided for other medically necessary reasons.

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56.

As a subdivision of the State, exercising its authority on behalf of the State, PEBB and the State are indivisible. Because PEBB’s actions are in fact those of the State acting by and through the agency, PEBB shares the same liability for the State’s violation of O.R.S. § 659A.030 as described above.

57.

In the alternative, PEBB has acted and continues to act as the agent of the State in denying Alec Esquivel’s request for coverage, and the State is liable for that denial. The State has the right to control PEBB’s performance of its duties because the State acts by and through PEBB. In particular, the State has the right to control the conduct that forms the basis of this complaint because the State’s own actions, by and through PEBB, give the State control over whether the State’s self-insured health plan discriminatorily denies coverage to those who need it for medical care based on their gender identity, while extending the same coverage to others who need the same medical care for reasons not related to their gender identity. The State authorizes and intends that PEBB act on the State’s behalf with respect to the discriminatory denial of coverage challenged here because the State has given PEBB exclusive authority to select, contract for, adopt and administer health plans pursuant to O.R.S. § 243.061 *et seq.*, including the Plan that refuses Alec Esquivel coverage.

58.

PEBB acted without a reasonable basis in fact or in law in making its Order. Its Order is in violation of O.R.S. § 659A.030 in that it effectuates discrimination on the basis of gender identity on behalf of the State as an employer.

59.

As a result of PEBB’s discriminatory denial of insurance coverage, Alec Esquivel has suffered and will suffer in the future economic losses because of increased health care costs. The amount of these losses are unknown at this time and this Complaint will be amended before trial to set

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forth the amounts.

60.

As a result of PEBB’s failure to cover his medically necessary procedures, Alec Esquivel has suffered adverse health effects and adverse health risks. As a further result of PEBB’s discrimination Alec Esquivel has suffered emotional distress, loss of dignity, anxiety, humiliation, and loss of enjoyment of life. These adverse consequences entitle Alec Esquivel to an award of compensatory damages in the amount of \$250,000.

61.

As a result of PEBB’s discriminatory actions Alec Esquivel is entitled to an award of his reasonable attorney fees and costs pursuant to O.R.S § 183.497.

WHEREFORE, Plaintiff/Petitioner Alec Esquivel prays for judgment in his favor and against Defendant State of Oregon, by and through the Oregon Judicial Department, Court of Appeals and the Public Employees’ Benefit Board, and against Respondent Public Employees’ Benefit Board, to include the following relief:

1. With respect to the First and Second Claims for Relief, an order finding and declaring that the Defendant’s and Respondent’s courses of conduct, policies and practices as described herein were unauthorized by law and violate O.R.S. § 659A.030(1)(b) and O.R.S. § 174.100(6), in that the courses of conduct, policies and practices discriminated against Alec Esquivel in his employment on the basis of his gender identity.
2. With respect to the First Claim for Relief, injunctive and all such other equitable relief to which Alec Esquivel is entitled, including, but not limited to: an order directing the State of Oregon and all of its agencies, boards, officials and employees who are engaged in the discrimination to cease all discriminatory practices, and to provide employment health insurance that covers the same

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medical care for employees based on their gender identity that is covered for employees based on other underlying medical reasons;

3. An order awarding Alec Esquivel compensatory damages in the amount of \$250,000; and
4. An order directing the State to pay Alec Esquivel costs and reasonable attorney fees pursuant to O.R.S. § 659A.885(1) and O.R.S § 183.497.
5. Such other relief as the Court may deem just and equitable.

DATED this 21st day of June, 2011.

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