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2 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
3 FOR THE COUNTY OF MULTNOMAH

4 GRACE KUO, an individual,  
5 Plaintiff,

6 v.

7 OREGON STATE UNIVERSITY, a  
8 public entity, SUSAN CAPALBO, an  
9 individual, and EDWARD FESER, an  
10 individual,  
11 Defendants.

Case No. 21CV11236

DEFENDANTS' MOTION FOR SUMMARY  
JUDGMENT

**ORAL ARGUMENT REQUESTED**

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Defendants' Motion for Summary Judgment

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1 **UTCR 5.050 ORAL ARGUMENT STATEMENT**

2 Defendants Oregon State University (the "University"), Susan Capalbo, and  
3 Edward Feser ("Defendants"), request oral argument. Official court reporting services are  
4 requested.

5 **MOTION**

6 In accordance with Oregon Rule of Civil Procedure 47, Defendants move the  
7 court for an order granting summary judgment in their favor and against plaintiff Grace Kuo's  
8 retaliation claim under ORS 659A.203 against the University and her aiding and abetting claims  
9 under ORS 659A.030(1)(g) against Edward Feser and Susan Capalbo. The undisputed material  
10 facts show that plaintiff's claims all fail as a matter of law.

11 This motion is supported by the records and files in this action, the following  
12 points and authorities, and the declaration of Erica A. Clausen ("Clausen Decl.").

13 **POINTS AND AUTHORITIES**

14 **I. INTRODUCTION**

15 Provost Ed Feser appointed plaintiff as Dean of the College of Pharmacy ("COP")  
16 in the summer of 2019. As Dean, plaintiff's role required, among other things, establishing a  
17 mission and vision for COP, creating a robust culture of collaboration, and engaging appropriate  
18 stakeholders when addressing challenges and opportunities in the COP. By early 2020, concerns  
19 surfaced that plaintiff was not effectively leading the COP, and soon those concerns developed  
20 into a groundswell of frustration. In March 2020, the COP's seven Executive Committee  
21 members asked to and met with Provost Feser to express serious concerns about plaintiff's  
22 leadership. In summer of 2020 Provost Feser had to become involved in managing a COP issue  
23 because of plaintiff's ineffective leadership, during which time he directly observed the types of  
24 issues that the Executive Committee had reported to him. In an effort to help plaintiff succeed,  
25 Provost Feser provided direction to her so she could focus on key leadership requirements, and  
26 he arranged for a 360-degree leadership assessment to help he and plaintiff determine what she

1 might need to do to succeed. Although the assessment results reflected major leadership  
2 challenges, plaintiff reported that she viewed the highly critical assessment as positive.

3           After multiple meetings between Provost Feser and plaintiff (and plaintiff's  
4 professional coach) about the assessment and the state of COP, and after continuing to receive  
5 serious reports of concern from the Executive Committee, it became evident to Provost Feser  
6 that plaintiff did not understand the areas in which she needed to improve. As a result, in  
7 December 2020, Provost Feser exercised his right under plaintiff's appointment to remove her  
8 from the dean role and remain as a COP faculty member, continuing her dean's pay for six  
9 months beyond any obligation to do so and with a teaching release.

10           The facts described above and with more detail below are undisputed. Plaintiff's  
11 "whistleblower" claims fail as a matter of law. She did not engage in protected activity, and, in  
12 any event, the record has no facts that Provost Feser's decision arose out of anything other than  
13 his concerns about plaintiff's leadership and plaintiff's failure to recognize those concerns.

14           Because the undisputed material facts show plaintiff's claims fail, the court should  
15 grant this motion for summary judgment and enter judgment in favor of Defendants.

## 16 **II. BACKGROUND**

### 17 **A. Provost Feser appoints plaintiff Dean of the University's COP.**

18           In June 2019, Provost Feser appointed plaintiff Dean of the COP. Clausen Decl. ¶  
19 3, Ex. 2 (Feser Dep. 12:13-15). The University assisted with her onboarding and introductions to  
20 other University leadership, including experienced deans from other colleges. Clausen Decl. ¶ 2,  
21 Ex. 1 (Kuo Dep. 37:2-39:3, Ex. 3); Clausen Decl. ¶ 3, Ex. 2 (Feser Dep. 13:8-13). Provost Feser  
22 also appointed a well-established and successful dean of another college to be plaintiff's mentor  
23 and provide additional support. Clausen Decl. ¶ 2, Ex. 1 (Kuo Dep. 45:10-46:17); Clausen Decl.  
24 ¶ 3, Ex. 2 (Feser Dep. 125:8-22). The COP has an Executive Committee of about seven associate  
25 deans and department chairs serving various COP departments who work with the COP dean and  
26 implement initiatives under the dean's leadership. Clausen Decl. ¶ 5, Ex. 4 (Filtz Dep. 12:19-24;

1 21:12-21). Some Executive Committee members participated in plaintiff's hiring process and  
2 were excited to have her in the role. Clausen Decl. ¶ 5, Ex. 4 (Filtz Dep. 11:18-12:6); Clausen  
3 Decl. ¶ 6, Ex. 5 (Leid Dep. 8:15-21). As her deanship began, Executive Committee members  
4 provided plaintiff with support and worked to help her understand the COP's operations. Clausen  
5 Decl. ¶ 4, Ex. 5 (Filtz Dep. 14:7-16); Clausen Decl. ¶ 11, Ex. 10 (Furuno Dep. 17:2-24).

6 **B. Within months, concerns surfaced with respect to plaintiff's leadership.**

7 Within months of her appointment, Executive Committee members had numerous  
8 concerns with plaintiff's leadership style and her ability to fulfill the role of a dean. Clausen  
9 Decl. ¶ 7, Ex. 6 (Bearden Dep. 36:10-20); Clausen Decl. ¶ 6, Ex. 5 (Leid Dep. 17:13-17;18:9-17;  
10 20:16-23); Clausen Decl. ¶ 8, Ex. 7 (Stevens Dep. 12:4-10); Clausen Decl. ¶ 11, Ex. 10 (Furuno  
11 Dep. 39:6-23). The Executive Committee members found that plaintiff communicated poorly,  
12 which caused inconsistent directions and duplicative efforts, lacked understanding of various  
13 perspectives, and micromanaged their and their colleagues' work. Clausen Decl. ¶ 5, Ex. 4 (Filtz  
14 Dep. 14-1:22; 15:21-18:2); Clausen Decl. ¶ 8, Ex. 7 (Stevens Dep. 12:11-14:23); Clausen Decl.  
15 ¶ 7, Ex. 6 (Bearden Dep. 33:23-34:17); Clausen Decl. ¶ 11, Ex. 10 (Furuno Dep. 17:2-24).

16 . The Executive Committee also found plaintiff did not respect subordinates,  
17 including having observed her unjustifiably berate her administrative assistant in front of a group  
18 of students. Clausen Decl. ¶ 9, Ex. 8 (Friesen Dep. 8:24-9:23); Clausen Decl. ¶ 5, Ex. 4 (Filtz  
19 Dep. 101:9-12).

20 In or around December 2019 or January 2020, Theresa Filtz, a member of the  
21 Executive Committee, let Provost Feser know that concerns were arising in the COP about  
22 plaintiff's leadership. Clausen Decl. ¶ 5, Ex. 4 (Filtz Dep. 59:3-15). Because of increasing  
23 concerns among Executive Committee members in March 2020, the Executive Committee asked  
24 to meet with Provost Feser. Clausen Decl. ¶ 5, Ex. 4 (Filtz Dep. 59:18-24); Clausen Decl. ¶ 6,  
25 Ex. 5 (Leid Dep. 20:16-23); Clausen Decl. ¶ 3, Ex. 2 (Feser Dep. 120:12-25). The Executive  
26 Committee members felt it necessary to share their frustrations with plaintiff's lack of listening

1 and delegation, plaintiff's failure to focus on the big picture needs of the COP, and her overall  
2 ineffectiveness with respect to communication. Clausen Decl. ¶ 5, Ex. 4 (Filtz Dep. 60:8-15);  
3 Clausen Decl. ¶ 7, Ex. 6 (Bearden Dep. 23:9-24). Promptly following his meeting with the  
4 Executive Committee, Provost Feser met with plaintiff days later to indicate that she needed to  
5 be attuned to the Executive Committee's concerns. Clausen Decl. ¶ 2, Ex. 1 (Kuo Dep. 61:5-15;  
6 83:3-7).

7           Shortly after having met with Provost Feser, plaintiff met with the Executive  
8 Committee and sought feedback, and members of the Executive Committee shared with her their  
9 concerns about her micromanagement and communication. Clausen Decl. ¶ 2, Ex. 1 (Kuo Dep.  
10 83:18-84:21; 83:3-7).

11           **C. The COP addresses diversity, equity, and inclusion ("DEI") concerns.**

12           In June 2020, some students within the College raised DEI concerns to plaintiff  
13 and the University's now former Vice President and Chief Diversity Officer, Charlene  
14 Alexander. Clausen Decl. ¶ 2, Ex. 1 (Kuo Dep. 122:17-123:17); Clausen Decl. ¶ 10, Ex. 9  
15 (Alexander Dep. 34:20-35:11). Thereafter, plaintiff met with Provost Feser and Senior Vice  
16 Provost Susan Capalbo to address how to effectively respond to the students' concerns. Clausen  
17 Decl. ¶ 10, Ex. 9 (Alexander Dep. 36:9-12); Clausen Decl. ¶ 2, Ex. 1 (Kuo Dep. 124:7-125:1).  
18 Among their concerns, students complained that the College's Executive Associate Dean, Gary  
19 Delander, had not adequately or appropriately responded to issues that they had raised to him  
20 related to their experiences as students. Clausen Decl. ¶ 10, Ex. 9 (Alexander Dep. 35:23-36:8);  
21 Clausen Decl. ¶ 3, Ex. 2 (Feser Dep. 31:15-32:6). Among Dr. Delander's roles as Executive  
22 Associate Dean was working with students and overseeing student affairs. Clausen Decl. ¶ 3, Ex.  
23 2 (Feser Dep. 145:1-25). Plaintiff had identified concerns about Dr. Delander, and she told  
24 Provost Feser and Senior Vice Provost Capalbo that she thought it would be helpful if he were to  
25 step down from his role as Executive Associate Dean. *Id.* Both Provost Feser and Senior Vice  
26 Provost Capalbo explained to plaintiff that, as Dean, Dr. Delander served at her pleasure, and

1 that it was therefore her decision whether to remove him from his administrative role. Clausen  
2 Decl. ¶ 10, Ex. 9 (Alexander Dep. 43:7-10; 44:11-21); Clausen Decl. ¶ 3, Ex. 2 (Feser Dep.  
3 35:24-36:15); Clausen Decl. ¶ 4, Ex. 3 (Capalbo Dep. 30:4-10). The meeting participants shared  
4 the view that, at a minimum, Dr. Delander should relinquish his role of working with students.  
5 Clausen Decl. ¶ 4, Ex. 3 (Capalbo Dep. 28:11-21). On Saturday, June 13, plaintiff had a long  
6 meeting with Senior Vice Provost Capalbo about a variety of potential approaches to making a  
7 change that was as non-disruptive to COP as possible. Clausen Decl. ¶ 2, Ex. 1 (Kuo Dep.  
8 131:11-132:10). On June 15, 2020, plaintiff informed Provost Feser she indeed would have Dr.  
9 Delander step down, which Provost Feser indicated he supported. Clausen Decl. ¶ 3, Ex. 2 (Feser  
10 Dep. 36:16-37:14).

11 **D. Plaintiff poorly executes the demotion of Dr. Delander, resulting in Provost**  
12 **Feser and Senior Vice Provost Capalbo having to provide significant**  
13 **assistance to manage the situation.**

14 Without consulting the Executive Committee or planning how Dr. Delander's  
15 departure would be managed, on June 15, 2020, plaintiff told Dr. Delander he would no longer  
16 be the Executive Associate Dean effective August 1, 2020. Clausen Decl. ¶ 4, Ex. 3 (Capalbo  
17 Dep., 57:1-13; 75:24-76:7); Clausen Decl. ¶ 5, Ex. 4 (Filtz Dep. 64:24-65:18; 66:25-66:7);  
18 Clausen Decl. ¶ 6, Ex. 5 (Leid Dep. 15:5-16:3); Clausen Decl. ¶ 7, Ex. 6 (Bearden Dep. 17:11-  
19 18:21). Dr. Delander had extensive operational experience and critical roles in the COP, and as a  
20 result, the Executive Committee members were shocked and expressed concerned about how  
21 Dr. Delander's work would be covered. *Id.* Additionally, plaintiff issued a public statement on  
22 Dr. Delander's demotion. Clausen Decl. ¶ 4, Ex. 3 (Capalbo Dep., 69:23-70:3); Clausen Decl. ¶  
23 6, Ex. 5 (Leid Dep. 15:5-16:3). Almost immediately, members of the Executive Committee  
24 expressed their concerns about operational issues and coverage, and alumni complained to both  
25 plaintiff and Provost Feser. Clausen Decl. ¶ 3, Ex. 2 (Feser Dep., 54:13-24; 60:23-61:2; 111:15-  
26 112:5). Clausen Decl. ¶ 7, Ex. 6 (Bearden Dep. 22:14-24). Overall, the COP faculty and staff  
were unsettled with the looming concern that they could be next to be terminated based on

1 plaintiff's abrupt handling of Dr. Delander's demotion. Clausen Decl. ¶ 2, Ex. 1 (Kuo Dep.,  
2 105:16-106:23, Ex. 7 at 4). Because plaintiff's handling of Dr. Delander's demotion had not been  
3 implemented smoothly, Provost Feser had concerns about plaintiff's ability to manage the  
4 situation moving forward, and so he had Senior Vice Provost Capalbo work with plaintiff.  
5 Clausen Decl. ¶ 3, Ex. 2 (Feser Dep. 140:21-141:15). Provost Feser and the Senior Vice Provost,  
6 the University worked with Dr. Kuo and Dr. Delander so that his student support role was ended,  
7 but he could continue to work in the Associate Dean capacity through December 31, 2020,  
8 supporting ongoing accreditation efforts that he had been critical to, and transition his work to  
9 others. Clausen Decl. ¶ 3, Ex. 2 (Feser Dep., 114:18-116:11, Ex. 29).

10 **E. Defendants continue to support plaintiff and provide leadership guidance.**

11 Throughout the summer of 2020, Provost Feser and Senior Vice Provost Capalbo  
12 worked to support plaintiff to calm the situation involving Dr. Delander and find ways to enable  
13 her success even amidst continued concerns from the Executive Committee. Clausen Decl. ¶ 3,  
14 Ex. 2 (Feser Dep., 84:20-85:16, Ex. 23); Clausen Decl. ¶ 2 (Kuo Dep., 166:16-167:5; 171:9-18,  
15 Exs. 12; 13); Clausen Decl. ¶ 12, Ex. 11 (Ramirez Dep., 93:11-94:18). After meeting with  
16 plaintiff, Provost Feser determined it necessary to provide written feedback to clarify for plaintiff  
17 that she needed to focus on providing strategic direction and leadership and delegate more of the  
18 daily operations of the COP to the Executive Committee. Clausen Decl. ¶ 2, Ex. 1 (Kuo Dep.,  
19 173:16-174:15, Ex. 14); Clausen Decl. ¶ 3, Ex. 2 (Feser Dep. 121:14-122:14). Specifically,  
20 Provost Feser directed that plaintiff to "empower the College of Pharmacy [] Executive  
21 Committee [] so that they may facilitate more of the routine day-to-day operations of the college,  
22 while you focus on the priority areas we discussed." Clausen Decl. ¶ 2 (Kuo Dep., 173:16-  
23 174:15, Ex. 14). He directed plaintiff to focus her time on developing COP's vision and strategic  
24 direction. *Id.*

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1           **F. A leadership assessment and ongoing concerns of the Executive Committee**  
2           **underscore the seriousness of concerns about her leadership.**

3           The University has guidelines for assessment of senior executives reporting to the  
4 President or Provost. Clausen Decl. ¶ 3, Ex. 2 (Feser Dep. 72:18-24). Along with providing  
5 direction to focus on creating a vision and strategic direction for the COP, and consistent with  
6 the assessment guidelines, Provost Feser decided that having a leadership assessment (360  
7 review) to help make sure he had a comprehensive and balanced view of her strengths and  
8 weaknesses, rather than only information coming from surfaced concerns of specific individuals  
9 or the Executive Committee. Clausen Decl. ¶ 3, Ex. 2 (Feser Dep. 94:24-96:12); Clausen Decl. ¶  
10 4, Ex. 3 (Capalbo Dep. 14:2-15:16). The leadership assessment was completed during August  
11 2020. Clausen Decl. ¶ 2 ( Kuo Dep., 183:10-184:2, Ex. 20). The leadership assessment results  
12 reflected a myriad of significant concerns, including for example:

- 13
- 14           • Large numbers of respondents indicated that plaintiff's performance did  
15           not meet expectations or needed improvement in all areas of leadership,  
16           which were (1) vision and mission for COP; (2) effective modeling of  
17           University values; (3) decision-making process; (4) advancement of COP  
18           reputation; (5) ability to engage appropriate stakeholders when necessary;  
19           and (6) ability to identify and take responsibility for personal  
20           development.

21           And the assessment included an abundance of troubling narrative comments, such as:

- 22           • "Is a poor communicator and listener; refused suggestions to obtain help to  
23           develop leadership or communication skills; is unaware of how she comes  
24           across when communicating; not able to see herself as others see her; not  
25           able to quickly process interpersonal and professional interactions[.]"
- 26           • "Unable to read a room or a situation well; unable to think through  
            political consequences of actions; lack of intuition; lack of self-  
            awareness[.]"
- "Overly focused on the internal affairs of the College; micromanages; too  
            deeply involved in lower levels of administration; struggles to delegate  
            effectively; focuses on minutiae[.]"

- "Does not take responsibility when something does not go well; blames others [.]"

Clausen Decl. ¶ 2 (Kuo Dep., 183:10-184:2, Ex. 20).<sup>1</sup>

In September and October 2020, Provost Feser met with plaintiff to review the results of the leadership assessment. Clausen Decl. ¶ 2 (Kuo Dep., 183:10-184:2, Ex. 20); Clausen Decl. ¶ 3 (Feser Dep., 136:18-137:17; 139:6-140:13, Exs. 36; 38). During these meetings, plaintiff failed to appreciate the overwhelmingly negative feedback. Clausen Decl. ¶ 3 (Feser Dep., 136:18-137:17; 139:6-140:13, Exs. 36; 38). Indeed, plaintiff indicated that she felt the leadership review reflected success, while even a brief review of it showed the opposite. *Id.*

Meanwhile, on September 21, 2020, the Executive Committee collectively wrote to both Provost Feser and Senior Vice Provost Capalbo expressing serious and continued concerns about plaintiff's leadership:

It has been three weeks since the performance survey for Dean Kuo closed and more than two months since we met to discuss leadership concerns in the College of Pharmacy. We appreciate the time you've taken to listen, respond, and intervene. We're writing to provide an update on the interactions between us, the members of Executive Committee, and Dean Kuo, and request a meeting with you as soon as possible. In brief, our interactions have not improved, and the Dean's behaviors have not significantly changed. While Dean Kuo has been making efforts to appear more positive and congenial in public interactions, behind the scenes she continues to demoralize faculty and staff, micromanage, and communicate poorly. These problems have affected every area of College operation, including alumni and donor relations, but they have been especially

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<sup>1</sup> Earlier that same summer, consistent with accreditation process requirements, COP underwent an American Association of Colleges of Pharmacy (AACCP) survey. Clausen Decl. ¶ 2 (Kuo Dep., Kuo Dep., 105:16-106:23, Ex. 7). It also included information about how survey respondents viewed leadership in the COP. Clausen Decl. ¶ 5, Ex. 4 (Filtz Dep. 110:18-111:9); Clausen Decl. ¶ 12, Ex. 11 (Ramirez Dep., 79:11-25, Ex. 14). A majority of the narrative comments expressed similar sentiments as the following example: "Our department chairs are awesome but the executive committee, as a whole, is dysfunctional. The Dean completely lacks vision and leadership skills, chooses to focus on the trivial details while ignoring the big picture, and has a bad habit of blaming others for her own shortcomings. This is just very poor form. Leadership is about accepting all of the blame when things go wrong and giving all the credit to others when things go well. The mass exodus of faculty and staff from the college should alarm university officials, if they were paying attention." Clausen Decl. ¶ 2, Ex. 1 (Kuo Dep., 105:16-106:23, Ex. 7 at 5).

1 problematic internally. \* \* \* Regarding the current relationship between the  
2 Executive Committee and the Dean, the Dean has never broached the topic aside  
3 from an email in August stating that she had your support to assign  
4 responsibilities to Executive Committee. She has given no evidence of any self-  
5 reflection or ownership following the AACP faculty survey in which nearly all  
6 indicators were negative relative to the past years. \* \* \* The bottom line is that  
7 the current situation is untenable for some members of the Executive committee  
8 and unsustainable for all.

9 Clausen Decl. ¶ 5, Ex. 4 (Filtz Dep. 95:17-97:9; 112:14-113:2; Ex. 21); Clausen Decl. ¶ 9, Ex. 8  
10 (Friesen Dep. 48:23-49:8); Clausen Decl. ¶ 7, Ex. 6 (Bearden Dep. 32:21-33:5)

11 As part of his assessment of plaintiff's leadership and in particular seeking  
12 evidence of possible improvement, between September and the end of November 2020, Provost  
13 Feser also solicited feedback from individual members of the Executive Committee, in which  
14 they generally reported concerns remained significant. Clausen Decl. ¶ 3, Ex. 2 (Feser Dep.  
15 152:15-153:17, Ex. 39).

16 By November 2020, Provost Feser had (i) information reflecting serious concerns  
17 about plaintiff's leadership starting with the Executive Committee's concerns in March of 2020,  
18 (ii) observed her inartful handling of the decision concerning Dr. Delander, (iii) a leadership  
19 assessment reflecting major concerns in all critical leadership areas, (iv) continuous vigorous  
20 concerns of the Executive Committee as a expressed in their September 21 email and individual  
21 communications, and (v) plaintiff's failure to recognize the substantial hurdles she needed to  
22 overcome to succeed. All this information convinced Provost Feser that the COP—its faculty,  
23 staff, and students, needed different leadership. As a result, on December 3, 2020, Provost Feser  
24 informed Plaintiff she would no longer serve as Dean and would instead assume a tenured  
25 faculty position within the COP, although maintaining her compensation as Dean through June  
26 30, 2020 and with a release from teaching responsibilities to smooth her transition. Clausen Decl.  
27 ¶ 2, Ex. 1 (Kuo Dep. 202:4-203:4); Clausen Decl. ¶ 3, Ex. 2 (Feser Dep. 173:17-174:4).

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1   **III.   LEGAL STANDARD**

2                   Summary judgment is warranted "if the pleadings, depositions, affidavits,  
3   declarations, and admissions on file show that there is no genuine issue as to any material fact  
4   and that the moving party is entitled to prevail as a matter of law." ORCP 47 C. If a party moves  
5   for summary judgment, the nonmoving party must respond with evidence, such as an affidavit or  
6   declaration, setting forth "specific facts showing that there is a genuine issue as to any material  
7   fact for trial." ORCP 47 D. If the nonmoving party fails to present evidence setting forth the  
8   specific facts supporting its position, "the court shall grant the [summary judgment] motion, if  
9   appropriate." *Id.*

10   **IV.   ARGUMENT**

11           A.    **Defendants are entitled to judgment as a matter of law on plaintiff's claim**  
12                   **under ORS 659A.203(1)(b).**

13                   Plaintiff's lawsuit is based on one subsection of one statute, ORS 659A.201(1)(b).  
14   First Amended Complaint ("FAC") ¶¶ 26-33. This provision makes it an unlawful employment  
15   practice for a public employer to take or threaten to take a disciplinary action against an  
16   employee for the disclosure of information the employee reasonably believes to be evidence of a  
17   violation of a state or federal law, rule, or regulation. ORS 659A.201(1)(b). To establish a prima  
18   facie case under ORS 659A.201(1)(b), a plaintiff must demonstrate that (1) she engaged in a  
19   protected activity; (2) she suffered an adverse employment decision; and (3) there was a causal  
20   link between the protected activity and the adverse employment decision. *Id.*; *see also Harper v.*  
21   *Mt. Hood Cmty. Coll.*, 283 Or App 207, 214 (2016). "[T]o show causation, a 'plaintiff must prove  
22   that defendant's unlawful motive was a substantial factor in h[er] termination, or, in other words,  
23   that [the plaintiff] would have been treated differently in the absence of the unlawful motive."  
24   *Harper v. Mt. Hood Cmty. Coll.*, 283 Or App 207, 214 (2016) (quoting *LaCasse v. Owen*, 278 Or  
25   App 24, 32–33 (2016)).

1                   **1. Plaintiff did not disclose information protected by**  
2                   **ORS 659A.203(1)(b).**

3                   Plaintiff alleges she "reported to Defendant OSU that Delander did not respond,  
4 made an inappropriate response or did not follow up regarding student complaints about  
5 discrimination, racism, bias toward students who speak English with an accent and sexual  
6 harassment." FAC. ¶ 29. And she asserts that "OSU took or threatened disciplinary action against  
7 Plaintiff because of Plaintiff's disclosure." FAC ¶ 30.

8                   Plaintiff does not satisfy the requirement that she disclosed a violation of law.  
9 Plaintiff testified that Charlene Alexander, Vice President and Chief Diversity Officer, had told  
10 Provost Feser about a meeting with COP students in which they had expressed concerns about  
11 racism, sexual harassment, and students who had accents.<sup>2</sup> Clausen Decl. ¶ 2, Ex. 1 (Kuo Dep.  
12 122-23). The next day Dr. Alexander and plaintiff met with Provost Feser and Senior Vice  
13 Provost Capalbo. *Id.* According to plaintiff, she "actually did not say a whole lot and Ed Feser  
14 did not ask for more detailed information." Clausen Decl. ¶ 2, Ex. 1 (Kuo Dep. 124:23-25). The  
15 conversation then turned to Dr. Delander. Clausen Decl. ¶ 2, Ex. 1 (Kuo Dep., 125-26). Indeed,  
16 plaintiff testified that she did not disclose a legal violation to Provost Feser. Clausen Decl. ¶ 2,  
17 Ex. 1 (Kuo Dep., 199:9-200:7).

18                   Plaintiff's claim resembles the rejected claim of a violation of ORS 659A.203 in  
19 *Folz v. State by and through Oregon Department of Transportation*, 287 Or App 667 (2017). In  
20 *Folz*, the plaintiff, a human resource manager expressed her view that disciplining an employee  
21 with a last chance agreement was too extreme. The plaintiff testified that had the employer  
22 investigated the situation prompting possible discipline, it might have learned information that  
23 could have resulted in an illegal decision with regard to disability discrimination. 287 Or App at  
24 669-70. The court of appeals affirmed summary judgment granted to the employer, ruling that

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25 <sup>2</sup> Dr. Alexander oversaw the response to the students, focusing on listening to their concerns and  
26 developing a course of intervention and staff development to ensure students were supported.  
Clausen Decl. ¶ 10, Ex. 9 (Alexander Dep. 34:7-15; 39:16-40:9).

1 discussions around solving the human resources issue were not a "disclosure" of illegal activity.  
2 287 Or App at 673. Instead, the plaintiff "gave advice about an evolving personnel matter as part  
3 of her day-to-day responsibilities as a human resources professional." 287 Or App at 676. This  
4 "conduct [was] neither a 'report' nor a 'disclosure' of wrongdoing" under ORS 659A.203. *Id.*

5 Here, Dr. Alexander telling Provost Feser that students expressed concerns at a  
6 meeting is not plaintiff disclosing a legal violation. While students can have negative  
7 experiences, including experiences based on protected status, a dean engaging with a provost to  
8 discuss how to respond to the students and resolve those concerns them is categorically not a  
9 report or disclosure of a violation of law. And, as mentioned above, even plaintiff does not think  
10 she disclosed a legal violation. Clausen Decl. ¶ 2, Ex. 1 (Kuo Dep., 199:9-200:7).

11 In sum, plaintiff doesn't think she engaged in protected activity that she asserts is  
12 the basis for her lawsuit. Her view is consistent with the undisputed material facts—she did not.  
13 As a result, all of her claims fail and judgment should be granted in favor of Defendants.

14 **2. No causal link exists between any purported protected activity and the**  
15 **decision to remove her from Dean of the COP.**

16 Even if plaintiff engaged in protected activity (which she did not), no facts  
17 suggest a causal link to the demotion from the role of dean to faculty. "[T]o show causation, a  
18 'plaintiff must prove that defendant's unlawful motive was a substantial factor in his termination,  
19 or, in other words, that [the plaintiff] would have been treated differently in the absence of the  
20 unlawful motive.'" *Harper*, 283 Or App at 214. The decision to remove plaintiff from Dean of  
21 the COP resulted from an enormous amount of information reflecting very ineffective leadership,  
22 which plaintiff plainly failed to recognize. *See infra* Section II. As a result, Provost Feser had no  
23 reason to believe that success was likely, and he made the decision considering the needs of the  
24 COP community—faculty staff and students—as a whole. Clausen Decl. ¶ 3, Ex. 2 (Feser Dep.  
25 129:2-11).

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1 Plaintiff cannot point to any fact that her alleged protected activity was a  
2 substantial factor in the decision to demote her. Indeed, even if one considers her attending a  
3 meeting focused on Dr. Delander after Dr. Alexander had informed Provost Feser about the COP  
4 student meeting, plaintiff testified that Provost Feser did not indicate he was unhappy she raised  
5 concerns about students. Clausen Decl. ¶ 2, Ex. 1 (Kuo Dep. 201:3-11). In fact, Provost Feser  
6 worked with plaintiff to figure out a way to manage the concerns, which he took seriously.  
7 Clausen Decl. ¶ 3, Ex. 2 (Feser Dep. 32:10-22); Clausen Decl. ¶ 2, Ex. 1 (Kuo Dep. 201:3-16).  
8 Thus, the communication that plaintiff is trying to shoehorn into protected activity is something  
9 the decision maker about her employment, Provost Feser, undisputedly worked with her to  
10 manage and confirmed the right offices were engaged to respond. Clausen Decl. ¶ 3, Ex. 2 (Feser  
11 Dep. 29:14-31:12). Plaintiff's demotion followed a drumbeat of information showing leadership  
12 problems expressed over a substantial period of time, including before and after Provost Feser  
13 and Senior Vice Provost Capalbo met with Dr. Alexander and plaintiff, by a substantial number  
14 of people, through a variety of modes of communication.

15 The undisputed facts show that plaintiff cannot prove causation to support her  
16 claims. As a result, her claims fail as a matter of law, and this motion for summary judgment  
17 should be granted.

18 **B. Provost Feser and Senior Vice Provost Cannot be liable because under**  
19 **ORS 30.265(3) the public body is the only proper defendant.**

20 The Oregon Tort Claims Act (the "OTCA") provides that "[t]he sole cause of  
21 action for a tort committed by officer, employees or agents of a public body acting within the  
22 scope of their employment or duties and eligible for representation and indemnification \* \* \* is  
23 an action against the public body." ORS 30.265(3).

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1           The individual defendants are employees of the University and therefore public  
2 employees. Clausen Decl. ¶ 3, Ex. 2 (Feser Dep. 8:21-23); Clausen Decl. ¶ 4, Ex. 3 (Capalbo  
3 Dep. 8:13-9:2). Plaintiff's claims against the individual defendants arise out of their alleged  
4 actions as University administrators. FAC ¶¶ 34-41, 43-50.

5           In assessing whether a public body is substituted in for an individual under  
6 ORS 30.265 the court evaluates: (1) whether the acts in question occurred substantially within  
7 the time and space limits authorized by the employment; (2) whether the employee was  
8 motivated, at least partially, by a purpose to serve the employer; and (3) whether the act is of a  
9 kind which the employee was hired to perform. *Johnson v. Oregon St. Ed. of Higher Educ.*, 272  
10 Or App 710, 717 (2015) (noting evaluation for defense and indemnity under ORS 30.285 is the  
11 same as whether an official is acting within the scope of employment under ORS 30.625).  
12 Plaintiff's allegations are the quintessential examples of when the public body is the sole  
13 defendant under ORS 30.265(3). There is no allegation indicating the individual officials were  
14 not motivated to serve their employer or that allegations related to the service the officials were  
15 required to perform. The OTCA's language plainly provides that if wrongdoing has occurred, the  
16 public body is subject to the action and liable for any conduct. ORS 30.265(1).

17           Accordingly, plaintiff's claims against the individual defendants fails as a matter  
18 of law, and at minimum the University—as the public body—must be substituted as a the sole  
19 defendant.

20           C.     **Plaintiff cannot establish a claim for aiding and abetting under**  
21                 **ORS 659A.030(1)(g).**

22           Plaintiff's second and third claims for relief are aiding and abetting claims against  
23 Senior Vice Provost Capalbo (plaintiff's second claim) and Ed Feser (plaintiff's third claim). The  
24 court does not need to evaluate the aiding and abetting claim if—as Defendants believe it  
25 should—the court grants the motion for summary judgment as set forth above. Nonetheless,  
26 independent reasons show that plaintiff's aiding and abetting claims should be dismissed. First,

1 Provost Feser cannot aid and abet his own decision, and therefore cannot be personally liable.  
2 Second, the undisputed facts show that Senior Vice Provost Capalbo simply engaged in efforts to  
3 resolve challenges in the COP and support plaintiff—she did not engage in any action that falls  
4 within the ambit of ORS 659A.030(1)(g)'s prohibition of aiding and abetting an unlawful  
5 employment practice.

6 ORS 659A.030(1)(g) prohibits “any person, whether an employer or an employee,  
7 to aid, abet, incite, compel or coerce the doing of any of the acts forbidden” by ORS Chapter  
8 659A. "In order to sustain a claim under [the] aiding and abetting statute, a plaintiff must first  
9 establish that there has been a violation to aid or abet." *Biggs v. City of St. Paul*, No. 6:18-CV-  
10 506-MK, 2019 WL 4575839, at \*16 (D. Or. Mar. 7, 2019), *report and recommendation adopted*  
11 *sub nom. Koch v. City of St. Paul*, No. 6:18-CV-0507-MK, 2019 WL 4544268 (D. Or. Sept. 18,  
12 2019). For the reasons described in Sections IV.A. above, plaintiff cannot establish a claim  
13 under ORS 659A.030(1)(g)—there is nothing to aid and abet, and therefore the court should  
14 dismiss the case in its entirety and enter judgment in favor of defendants.

15 **1. Provost Ed Feser did not—and could not as the authorized decision**  
16 **maker—aid and abet under ORS 659A.203.**

17 If plaintiff could survive summary judgment on her ORS 659A.203 claim, the  
18 ORS 659A.030(1)(g) claims should be dismissed against Provost Feser. Where an individual  
19 has executive authority for an organization and acts within the course and scope of his  
20 employment, the individual cannot be liable for aiding and abetting. *See Baker v. Maricle Baker*  
21 *v. Maricle Indus., Inc.*, 2017 WL 1043282, at \*3 (D. Or Mar. 17, 2017); *see also Peters v.*  
22 *Betaseed, Inc.*, 2012 WL 5503617, \*7 (D. Or Nov. 9, 2012). It is undisputed that Provost Feser  
23 held the authority to remove plaintiff from her deanship and he did so within the course and  
24 scope of his employment. Clausen Decl. ¶ 3, Ex. 2 (Feser Dep. 11:8-15; 12:13-15; 138:15-21;  
25 173:17-174:17).

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1 As a result, Provost Feser is entitled to judgment as a matter of law on plaintiff's  
2 ORS 659A.030(1)(g) claim.

3 **2. The undisputed facts show that Senior Vice Provost Susan Capalbo**  
4 **did not violate ORS 659A.030(1)(g).**

5 Senior Vice Provost cannot be held liable under ORS 659A.030(1)(g) because  
6 there is no evidence that she "aided, abetted, incited, compelled or coerced" Provost Feser into a  
7 decision that removed plaintiff from Dean of the COP. Moreover, no facts suggest any action  
8 Senior Vice Provost took was caused by plaintiff engaging in activity protected under  
9 ORS 659A.203.

10 As Senior Vice Provost, Capalbo's position included support of faculty,  
11 promotion and tenure work, and involvement in hiring and accreditation processes. Clausen  
12 Decl. ¶ 4, Ex. 3 (Capalbo Dep. 9:25-10:25). Senior Vice Provost Capalbo reported directly to  
13 Provost Feser and none of the deans were her direct reports, including plaintiff. *Id.* The  
14 undisputed record throughout reflects Senior Vice Provost Capalbo worked with plaintiff and  
15 Provost Feser to manage issues arising in the COP, consistent with the role she described. *See*  
16 *infra* Section II.C-F. There is no evidence she made or drove Provost Feser toward his decision;  
17 and Senior Vice Provost Capalbo did not directly participate in Provost Feser's final decision-  
18 making. Clausen Decl. ¶ 3 (Feser Dep., Exs. 36; 38). Moreover, no facts even hint that somehow  
19 Senior Vice Provost Capalbo had some retaliatory animus that caused her to engage in any action  
20 because of a protected activity, which plaintiff would have to have to create liability under ORS  
21 659A.030(1)(g).

22 As a result, Senior Vice Provost Capalbo is entitled to judgment as a matter of law  
23 on plaintiff's ORS 659A.030(1)(g) claim.

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1 **V. CONCLUSION**

2 None of plaintiff's claims under ORS 659A.203 or ORS 659A.030(1)(g) are  
3 actionable as a matter of law. Plaintiff is not a "whistleblower" under any understanding of that  
4 term—and certainly not under the legal standard to be one. And countless sources and  
5 voluminous records of feedback critical of plaintiff's leadership show that her removal from the  
6 dean position had nothing to do with anything other than the ongoing significant leadership  
7 concerns.

8 Accordingly, Defendants are entitled to judgment as a matter of all dismissing all  
9 of plaintiff's claims, and the court should dismiss the complaint and enter judgment in their  
10 favor.

11

12 DATED this 30th day of November, 2022.

13

MILLER NASH LLP

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*s/ Erica A. Clausen*

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I served the foregoing Defendants' Motion for Summary Judgment  
3 on the attorney listed below on the date set forth below by the method(s) indicated:

4 Martin C. Dolan  
5 Chelsea Sandbloom  
6 DOLAN LAW GROUP PC  
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9 *Attorneys for Plaintiff*

- 10  First-class mail, postage prepaid
- 11  Facsimile, pursuant to ORCP 9 F
- 12  Hand-delivery
- 13  Overnight courier, delivery prepaid
- 14  Email, pursuant to ORCP 9 G
- 15  Email copy, as a courtesy only  
*timcunningham@dwt.com*
- 16  Electronic service, by the Court's OJD  
eFiling system, at the email address as  
recorded on the date of service in the  
eFiling system pursuant to ORCP 9 H
- 17  Other: \_\_\_\_\_

18 DATED this 30th day of November, 2022.

19 s/ Erica A. Clausen  
Erica A. Clausen, OSB No. 170902

20 *Of Attorneys for Defendants Oregon State*  
*University, Susan Capalbo, and Edward Feser*

21 4875-3505-5936.6