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

GRACE KUO, an individual,

Plaintiff,

v.

OREGON STATE UNIVERSITY, a public  
entity, SUSAN CAPALBO, an individual,  
and EDWARD FESER, an individual,

Defendants.

Case No. 21CV11236

OREGON STATE UNIVERSITY'S  
TRIAL MEMORANDUM

Assigned Judge: Katharine von Ter Stegge  
Room Number: 16C

Trial Date: January 30-February 14, 2023

**I. INTRODUCTION**

This case is about the expectations of leaders and how plaintiff Grace Kuo, in her role as Dean of the College of Pharmacy (the “COP” or the “College”) of Oregon State University (“OSU”), failed to meet those expectations. OSU will present witness after witness and record after record reflecting facts that show how plaintiff fell far short of displaying the competencies expected of leaders. The result was a significant harm to morale in the College and an obstacle to its effective operation. And because of these concerns, OSU, through its Provost, Edward Feser, decided that it was necessary to end plaintiff’s Dean appointment, although she continued as a tenured professor—with a release from teaching for the first term on her return, and she maintained her \$320,000 annual Dean salary for six months following the end of her appointment.

Of course, this is an employment case brought by plaintiff. And she has the burden to prove a single claim, an alleged violation of ORS 659A.203. That statute prohibits public employers from taking action against a “whistleblower” for engaging in conduct protected by the

1 statute. Plaintiff cannot prove she engaged in conduct protected by the statute, and even if she  
2 could, she cannot show her demotion arose because of protected whistleblowing.

## 3 **II. THE LEGAL CLAIMS AND SCOPE OF EVIDENCE**

4 In relevant part, ORS 659A.203 provides that it is unlawful for a public employer to:

5 (b) Prohibit any employee from disclosing, or take or threaten to take  
6 disciplinary action against an employee for the disclosure of any information that  
7 the employee reasonably believes is evidence of:

8 (A) A violation of any federal, state, or local law, rule or regulation  
9 by the public or nonprofit employer;<sup>1</sup>

10 Accordingly, plaintiff must prove she *disclosed* information protected by the statute and  
11 that OSU ended her Dean appointment because she did so. *See Lindsey v. Clatskanie People's*  
12 *Utility Dist.*, 140 F Supp 3d 1077, 1092 (D Or 2015) (citing *Bjurstrom v. Oregon Lottery*, 202 Or  
13 App 162, 172 (2005)).

14 OSU's position is there was no disclosure because plaintiff did not actually engage in a  
15 disclosure of information protected under the statute. Plaintiff had conversations with OSU  
16 administrators Provost Feser and Senior Vice Provost Susan Capalbo about how best plaintiff  
17 could manage and respond to concerns raised by students about diversity, equity, and inclusion  
18 in the College managed by plaintiff, but the communications were not disclosures under the  
19 statute—put simply, plaintiff was not “blowing the whistle” on anything.

20 What plaintiff must prove bears on the scope of evidence in the case and relates to OSU's  
21 first motion *in limine*. What plaintiff communicated to the decision maker Provost Feser is what  
22 matters under the statute; the facts underlying what plaintiff discussed do not. In response to  
23 defendants' motion for summary judgment and in proposed exhibits, plaintiff raised evidence  
24 about issues in the COP that she does not allege she communicated to (and that no evidence

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25 <sup>1</sup> Plaintiff has indicated she plans to amend her complaint now to assert a claim based on alleged disclosure of  
26 “mismanagement” under ORS 659A203. If plaintiff maintains that position and seeks leave as expected, OSU will  
oppose the motion for leave.

1 supports that she communicated to) Provost Feser, or to Senior Vice Provost Capalbo, who was  
2 not a decision maker but was involved in supporting efforts to address challenges created by  
3 plaintiff in the COP. This evidence does not bear on the scope of the case.

4 As discussed below, the evidence in this case otherwise is similar to most employment  
5 disputes. Plaintiff will put on evidence to attempt to prove she engaged in protected activity and  
6 assert that the protected activity caused the end of her appointment as Dean. Plaintiff has scant if  
7 any evidence. OSU will put on evidence that it had reasons for its decision to end her Dean  
8 appointment—that any alleged protected activity did not cause that decision. OSU has  
9 substantial evidence of concerns about plaintiff’s leadership—which Provost Feser learned from  
10 many sources and observed over a long period of time—and concerns about leadership were the  
11 reason that it made the decision about which she complains. OSU believes that this case will  
12 likely be disposed of under Rule 60, but if not, the evidence will result in a verdict for OSU.

### 13 **III. FACTUAL BACKGROUND**

#### 14 **A. Provost Feser appoints Plaintiff Dean of COP and by early 2020 problems** 15 **with her leadership were impacting the College.**

16 In June 2019, plaintiff was appointed Dean of the COP. Within months of her  
17 appointment, plaintiff’s leadership approach and communication style significantly began to  
18 impact the morale of COP. The COP is operated in large part by its Executive Committee, which  
19 is comprised of primarily associate deans and department chairs. Executive Committee members  
20 will testify that plaintiff was focused on minutia to the detriment of critical COP issues and that  
21 she was not trustworthy, and they will provide examples of ways that plaintiff made their work  
22 and the work of the COP difficult and unpleasant. Although the Executive Committee members  
23 uniformly supported plaintiff’s appointment and wanted her to succeed, their experiences caused  
24 them great consternation.

25 In January 2020, a College Executive Committee member let Provost Feser know she and  
26 others had concerns about how plaintiff was leading the COP. In the meantime, Provost Feser,

1 with assistance from Senior Vice Provost Capalbo, was ensuring that plaintiff had the support of  
2 a mentor and providing guidance to her in the hope that she would settle in and succeed.  
3 Nevertheless, concerns within the COP grew in early 2020, and in March, the Executive  
4 Committee sought a meeting with Provost Feser because their concern was already significant by  
5 that point in time. In their meeting, Executive Committee members expressed concern about  
6 plaintiff's communication style, which was viewed as inconsistent, one-sided, and disrespectful  
7 toward subordinates, and her tendency to micromanage at the expense of addressing the  
8 important issues of the College. To be sure, a College leadership team seeking out the Provost  
9 without their Dean is unusual and a notable reflection of the level of concern about plaintiff's  
10 leadership.

11 Following the meeting, Provost Feser provided guidance to plaintiff—trying to balance  
12 the need to provide that guidance against coming across as adversarial, which risked being  
13 counterproductive. And plaintiff, at his suggestion, asked the Executive Committee about their  
14 concerns. In a March 24, 2020, meeting, Executive Committee members provided feedback to  
15 plaintiff, which plaintiff followed up with an email to the Executive Committee to apologize and  
16 describe her point of view with respect to the concerns that the members had told her about.

17 **B. Plaintiff and Vice President and Chief Diversity Officer Charlene Alexander**  
18 **consult with Provost Feser and Senior Vice Provost Capalbo about student**  
19 **concerns that Plaintiff was working to manage within her College.**

20 In June 2020, some students with the COP raised concerns relating to diversity, equity,  
21 and inclusion (“DEI”) during a meeting with some members of the Executive Committee. This  
22 was a period in time when concerns about DEI issues were being discussed on a nationwide basis  
23 following the murder of George Floyd. Plaintiff and the University's now former Vice President  
24 and Chief Diversity Officer, Charlene Alexander were alerted to the concerns. Following  
25 conversations at two student town hall meetings, on June 11, 2020, Dr. Alexander updated  
26 Provost Feser about the concerns. On June, 12, 2020, plaintiff met with Provost Feser, Senior  
Vice Provost Capalbo, and Dr. Alexander to discuss the response to the students' concerns.

1 Provost Feser and Senior Vice Provost Capalbo ensured that the Office of Institutional Diversity,  
2 which Dr. Alexander led, was involved in addressing the students' concerns that were occurring.  
3 Some of the students' stated concerns were about COP's Executive Associate Dean,  
4 Gary Delander, and his responses to DEI issues in the past. Plaintiff had had issues with  
5 Dr. Delander and indicated to Provost Feser and Senior Vice Provost Capalbo that it would be  
6 helpful if he were to step down. Provost Feser explained to plaintiff that, as Dean of the COP,  
7 Dr. Delander served at her pleasure and that it was her decision to have Dr. Delander step down  
8 from his role if she thought that best.

9       Following the June 12 meeting, on June 13, 2020, plaintiff had a conversation with  
10 Senior Vice Provost Capalbo, who was providing support and a sounding board about how  
11 plaintiff could best address issues in the College. They discussed the College's structure, and  
12 focused on the need for a transition plan to mitigate against disruption if Dr. Delander were to  
13 step down, given that Dr. Delander had critical roles with ongoing College work—such as  
14 accreditation—and that he had vast experience and operational knowledge to be passed on to  
15 other leaders. Dr. Delander had discussed retirement on a number of occasions, and Senior Vice  
16 Provost Capalbo understood plaintiff would meet with Dr. Delander and come up with an  
17 appropriate transition plan.

18       **C. Plaintiff's execution of having Dr. Delander step down creates turmoil and**  
19       **Provost Feser and Senior Vice Provost Capalbo have to provide substantial**  
20       **support to plaintiff and the College.**

21       Plaintiff decided to demote Dr. Delander and met with him on June 15, 2020, telling him  
22 that he needed to resign from his Associate Dean position effective August 1, 2020. Plaintiff had  
23 not engaged in the necessary work to ensure an appropriate transition. Members of the Executive  
24 Committee were shocked when plaintiff abruptly informed them of plaintiff's decision and  
25 concerned about their own welfare. Shortly after the announcement, alumni and Executive  
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1 Committee concerns came forward to plaintiff directly, to others at OSU, and to Senior Vice  
2 Provost Capalbo and Provost Feser.

3 Plaintiff sought the support of Provost Feser and Senior Vice Provost Capalbo to address  
4 the “flood” of negative reactions, and they provided it. Provost Feser offered guidance, tried to  
5 guide plaintiff with perspective on the situation, and suggested ways that Senior Vice Provost  
6 Capalbo and others could support her. Senior Vice Provost Capalbo responded to concerns  
7 from the Executive Committee and provided support to plaintiff to manage the transition of  
8 Dr. Delander. Ultimately it became evident that plaintiff’s chosen August 1, 2020, transition date  
9 was not feasible and, to calm the turmoil, Provost Feser and Senior Vice Provost Capalbo  
10 worked with plaintiff to have the date for Dr. Delander to step down changed to the end of 2020  
11 so an effective transition could occur. Through these events, Provost Feser observed firsthand the  
12 types of communication and leadership concerns that the Executive Committee had expressed to  
13 him in March.

14 By mid-July, the situation involving Dr. Delander’s transition had been managed. Having  
15 substantial information that plaintiff’s leadership capabilities were in question, Provost Feser  
16 sought ways that she might be successful and undertook two steps to try to find a path to success.  
17 First, Provost Feser provided guidance, in a meeting and in writing, to plaintiff. Provost Feser  
18 encouraged plaintiff to have the Executive Committee manage the day-to-day operations of the  
19 College so that plaintiff could focus on key leadership obligations of establishing a vision and  
20 planning to empower the faculty and stakeholders in a shared vision. Second, OSU has an  
21 assessment tool for leaders that it implements in the first to third year of an academic leader’s  
22 work. The assessment is a “360” assessment in that it obtains feedback from a variety of sources.  
23 Provost Feser wanted to understand if the Executive Committee members’ concerns were  
24 cabined to that group or whether they were broader, and he determined that obtaining  
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1 information from an assessment might help plaintiff see where she could grow and therefore help  
2 her succeed.

3 **D. The Executive Committee alerts Provost Feser that its concerns are**  
4 **continuing and increasing.**

5 As the leadership assessment information gathering began, the results of an American  
6 Association of College of Pharmacy (“AACP”) survey were provided to the College and passed  
7 along from the Executive Committee. The AACP surveyed faculty and staff in the COP—it  
8 included a section soliciting feedback on how respondents viewed leadership in the COP,  
9 including plaintiff’s performance as Dean. The results were the worst Executive Committee  
10 members had seen for the COP and the comments reinforced the leadership concerns Executive  
11 Committee members held and reflected the breadth of the concerns. Views of leadership were on  
12 a downward trajectory and compared unfavorably with information from peer schools and past  
13 surveys.

14 On August 14, 2020, Executive Committee member David Bearden informed Provost  
15 Feser that plaintiff “continue[d] to display limited understanding of her role in ongoing  
16 challenges” in the COP and he had concern about the “dismal internal ratings of the Dean’s  
17 performance in leadership” reflected by the AACP survey.

18 Meanwhile, on September 21, 2020, the Executive Committee collectively wrote to both  
19 Provost Feser and Senior Vice Provost Capalbo expressing serious and continued concerns about  
20 plaintiff’s leadership. The Executive Committee described plaintiff’s leadership: “she continues  
21 to demoralize faculty and staff, micromanage, and communicate poorly,” and concluded “[t]he  
22 bottom line is that the current situation is untenable for some members of the Executive  
23 Committee and unsustainable for all.”

24 The leadership assessment was completed in late September 2020. The results were a  
25 troubling compilation of the views of the COP and reflected poorly on plaintiff in most  
26 categories—with a majority of respondents indicating that plaintiff did not meet expectations

1 (the lowest response) or needs improvement (second lowest) in many categories—significantly  
2 outnumbering those indicating responses of strong or exceptional. And written responses  
3 reflected a lack of trust, concerns about decision making, and concerns about communication. In  
4 fact, the results were the worst Provost Feser had seen over the course of his leadership as  
5 Provost.

6 In September and October 2020, Provost Feser met with plaintiff to review the results of  
7 the leadership assessment and they ended up meeting three times. During these meetings,  
8 plaintiff failed to grasp or appreciate the overwhelmingly negative feedback—and instead tried  
9 to focus on the positive, and she deflected criticism instead of suggesting convincing and viable  
10 plans for ways that she could address the concerns.

11 **E. Provost Feser assesses the information about plaintiff’s leadership, and**  
12 **decides OSU needs to end her appointment as Dean.**

13 As part of his assessment of plaintiff’s leadership and seeking evidence of possible  
14 improvement, between September and the end of November 2020, Provost Feser also solicited  
15 feedback from individual members of the Executive Committee, but it was evident the concerns  
16 remained and the concerns were significant.

17 By November 2020, Provost Feser had (i) information reflecting serious concerns about  
18 plaintiff’s leadership starting with the Executive Committee’s concerns in March of 2020,  
19 (ii) observed her inartful handling of the decision concerning Dr. Delander, (iii) a leadership  
20 assessment reflecting major concerns in all critical leadership areas, (iv) continuous vigorous  
21 concerns of the Executive Committee as a expressed in their September 21 email and individual  
22 communications, (v) the AACP survey results, and (vi) plaintiff’s failure to recognize the  
23 substantial hurdles she needed to overcome to succeed. All this information convinced Provost  
24 Feser that the COP—its faculty, staff, and students, needed different leadership. As a result, on  
25 December 3, 2020, Provost Feser informed plaintiff she would no longer serve as Dean and  
26 would instead assume a tenured faculty position within the COP with a release from teaching

1 responsibilities for the upcoming semester to smooth her transition and the same \$320,000  
2 annual compensation rate she had as Dean.

#### 3 **IV. DISCUSSION**

##### 4 **A. Plaintiff did not disclose information constituting protected activity under** 5 **ORS 659A.203.**

6 As described above, plaintiff must prove she engaged in activity protected under  
7 ORS 659A.203. Communications that are made in the course of regular work duties do not rise  
8 to the magnitude of protected activity under the statute. *See Folz v. State by and through Oregon*  
9 *Department of Transportation*, 287 Or App 667, 674 (citing *Bjurstrom v. Oregon Lottery*, 202 Or  
10 App 162, 171 (concluding that none of the plaintiff’s disclosures fell within the types  
11 enumerated in ORS 659A.203(1)(b)(A) where, despite making general references to the  
12 defendant’s violation of rules, the plaintiff failed to “identify with any particularity \* \* \* what  
13 rules [defendant] supposedly violated”). The facts about plaintiff’s communications will show  
14 that she is not a whistleblower as contemplated by the statute—she engaged in routine  
15 communication with other leaders at OSU to address the student concerns.

##### 16 **B. The reason OSU ended plaintiff’s appointment as Dean was because of the** 17 **ongoing concerns about her leadership.**

18 To prevail on her claim, not only must plaintiff prove she engaged in a protected  
19 disclosure, but also that doing so was a substantial factor in the reason for the employment  
20 decision. “[I]n other words, that [the plaintiff] would have been treated differently in the absence  
21 of the unlawful motive.” *Harper v. Mt. Hood Cmty. Coll.*, 283 Or App 207, 214 (2016). Plaintiff  
22 cannot meet her burden here.

23 As described above—if plaintiff engaged in a protected disclosure, such alleged  
24 “whistleblowing” had no bearing on the decision to end her appointment as Dean.

25 Plaintiff did not engage in protected activity. First and foremost in the minds of Provost  
26 Feser and Senior Vice Provost Capalbo was to make sure that there was a plan to address the

1 student concerns, which they took seriously. There is not a hint of evidence that Provost Feser  
2 was upset that concerns of students were brought to his attention—to the contrary—Provost  
3 Feser wanted to make sure they were being addressed and understood that they were indeed  
4 being addressed. Similarly, Senior Vice Provost Capalbo wanted to make sure the concerns  
5 were being addressed, had trust in the Office of Institutional Diversity, and understood that  
6 Dr. Alexander was undertaking a plan to address the concerns, and was not upset—at all—about  
7 learning of them.

8           Instead, the ongoing drumbeat of information showing leadership problems expressed  
9 over a substantial period of time, including before and after Provost Feser and Senior Vice  
10 Provost Capalbo met with Dr. Alexander and plaintiff in June of 2020. And the information  
11 came from a substantial number of people and a variety of sources. When confronted with that  
12 negative information regarding her performance as a leader, plaintiff deflected and focused on  
13 the positive, convincing Provost Feser that there was not a path to remedy the frayed relationship  
14 and morale problems that plaintiff’s leadership had created in the College. If she couldn’t even  
15 recognize the problem, Provost Feser had no reason to believe that she could address the  
16 problem. And, in her approach to hearing about the problem, she did the opposite of what OSU  
17 expects leaders to do—she deflected and was not accountable or self-reflective. Provost Feser  
18 made a considered and thoughtful decision based on the leadership concerns, and in no way  
19 based his decision on having learned of the students’ concerns.

## 20 **V. CONCLUSION**

21           Despite earnest efforts from Executive Committee members, Provost Feser, Senior Vice  
22 Provost Capalbo and others to help find a way for plaintiff to succeed, she did not demonstrate  
23 the leadership competencies necessary to successfully lead the College. The culmination of  
24 months’ worth of events, frustrations in the COP, troubling assessment results, and a lack of self-  
25 reflection prompted OSU to end plaintiff’s appointment as Dean. OSU is confident the evidence  
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1 will lead to the conclusion that plaintiff did not prove her case, and a verdict will be rendered in  
2 favor of OSU.

3  
4 DATED this 26th day of January, 2023.

5 MILLER NASH LLP

6 *s/Michael Porter*

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13 *Edward Feser*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I served the foregoing OSU’s Trial Memorandum on the attorney(s)  
3 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  
7 4300 NE Fremont, Ste 250  
8 Portland, OR 97213

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  E-mail, pursuant to ORCP 9 G
- 15  **E-mail copy, as a courtesy only**  
[martin@dolanlawgroup.com](mailto:martin@dolanlawgroup.com)  
[chelsea@dolanlawgroup.com](mailto:chelsea@dolanlawgroup.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 26th day of January, 2023.

19 *s/Michael Porter*

20 Michael Porter, P.C., OSB No. 003560

21 *Of Attorneys for Defendants*  
22 *Oregon State University, Susan Capalbo,*  
23 *and Edward Feser*

24 4874-3338-7597.1