

**FILED: May 16, 2012**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

BLACHANA, LLC,  
dba Penner's Portsmouth Club,  
Petitioner,

v.

BUREAU OF LABOR AND INDUSTRIES,  
Respondent.

Oregon Bureau of Labor and Industries  
0608

A143894

Argued and submitted on April 11, 2011.

Jonathan M. Radmacher argued the cause for petitioner. With him on the brief was McEwen Gisvold LLP.

Greg Rios, Assistant Attorney General, argued the cause for respondent. With him on the brief were John R. Kroger, Attorney General, and David B. Thompson, Interim Solicitor General.

Before Ortega, Presiding Judge, and Brewer, Judge, and Sercombe, Judge.\*

SERCOMBE, J.

Reversed and remanded.

\*Brewer, J., *vice* Rosenblum, S. J.

1                   SERCOMBE, J.

2                   Blachana, LLC, seeks judicial review of a final order issued by the Bureau  
3 of Labor and Industries (BOLI), contending that BOLI erred in concluding that Blachana  
4 was liable as an "[e]mployer" for wage claims under ORS 652.310(1). ORS 652.310(1)  
5 defines "employer" to include "any successor to the business of any employer." BOLI  
6 concluded that Blachana was liable for wage claims made by former employees of an  
7 entity, NW Sportsbar, Inc., that had previously operated a restaurant and bar at the same  
8 site as a restaurant and bar operated by Blachana. Blachana maintains that BOLI's  
9 interpretation of "successor to the business" in ORS 652.310(1) is not within the  
10 legislature's intended meaning of the term and that it is not a "successor to the business"  
11 of NW Sportsbar because it is a separate corporate entity with no connection to NW  
12 Sportsbar. Alternatively, Blachana contends that, even if BOLI's statutory interpretation  
13 is correct, BOLI erred in its application of the statute to the facts of this case. We  
14 ultimately conclude that Blachana is not a "successor to the business" of NW Sportsbar  
15 within the meaning of ORS 652.310(1) and reverse and remand.

16                   The following facts are undisputed. The property related to this dispute is  
17 designed and has long been used to operate a bar and restaurant. Before 2005, the owner  
18 of the property, C.P. Underhill, LLC, (Underhill) and its manager, Janet Penner, operated  
19 a bar called the "Portsmouth Club" and a restaurant named "Mama's BBQ" at the  
20 location.<sup>1</sup> In 2005, NW Sportsbar entered into agreements with Underhill and Chris

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<sup>1</sup>                   Apparently, the property contains separate spaces for a restaurant and a bar.



1 Blachana, LLC, as a corporation. The next day, Blachana registered the assumed  
2 business name of "Penner's Portsmouth Club." Blachana applied for and received a  
3 liquor license, lottery license, city business license, and tax and employer identification  
4 numbers.<sup>5</sup> In June 2006, a BOLI employee twice called the phone number registered for  
5 NW Sportsbar, and Chris Penner answered the phone by identifying the business as the  
6 "Portsmouth Club." Blachana opened "Penner's Portsmouth Club" in the bar area of the  
7 property on June 26, 2006. The restaurant area initially remained closed and was used  
8 for storage. In the months that followed, Blachana began offering live music at the bar  
9 and replaced all of the kitchen equipment except for the dishwasher station. Blachana  
10 continued to use much of the bar equipment that remained after NW Sportsbar  
11 surrendered the premises and has also used the same beer vendor. Blachana, however,  
12 contracted with a different food vendor.

13 Blachana did not employ any of NW Sportsbar's former employees. After  
14 almost a year of operation, Blachana registered the assumed business name of  
15 "Portsmouth Pizza and Pub" and began cooking and serving pizza.

16 In the months after NW Sportsbar ceased doing business, its former

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<sup>5</sup> The surrender and release agreement listed the assets being surrendered, which included,

"[t]o the extent transferable, all \* \* \* licenses, permits, \* \* \* and other registrations of any [governmental entity] held by NW Sportsbar and required or appropriate for the conduct of the Business[.]"

The record does not indicate, and we do not address, whether Blachana could legally use the licenses and permits that NW Sportsbar had surrendered.

1 employees filed wage claims with BOLI to recover unpaid wages. BOLI paid the claims,  
2 totaling \$7,047.62, from the Wage Security Fund. *See* ORS 652.409 (establishing fund to  
3 pay wage claims if employer is no longer in business and is without sufficient assets to  
4 pay the claim). Subsequently, BOLI notified Blachana that it, as a "successor" to NW  
5 Sportsbar, was responsible for the claims. Following a contested case hearing with an  
6 administrative law judge, BOLI's commissioner issued a final order concluding that  
7 Blachana was a "'successor to the business' of NW [Sportsbar] within the meaning of  
8 ORS 652.310(1) and, as an employer, is subject to the provisions of [the wage claim  
9 laws]." The commissioner ordered Blachana to reimburse BOLI for the unpaid wages,  
10 plus penalties authorized by statute. *See* ORS 652.414(3) (authorizing a penalty in the  
11 amount of 25 percent of the wages paid from the fund). Blachana petitioned for judicial  
12 review, challenging BOLI's determination that it is a "successor" to NW Sportsbar.

13 BOLI has statutory authority to recover from an "employer" the amounts  
14 paid from the Wage Security Fund. ORS 652.414(3) (authorizing BOLI's commissioner  
15 to commence an action to recover amounts paid from the fund "from the employer, or  
16 other persons or property liable for the unpaid wages"). An "[e]mployer" is

17 "any person who in this state, directly or through an agent, engages  
18 personal services of one or more employees and includes *any successor to*  
19 *the business of any employer*, or any lessee or purchaser of any employer's  
20 business property for the continuance of the same business, so far as such  
21 employer has not paid employees in full."

22 ORS 652.310(1) (emphasis added).<sup>6</sup>

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<sup>6</sup> BOLI has promulgated an administrative rule, OAR 839-001-0500(10),

1 Blachana did not purchase or lease NW Sportsbar's business property; thus,  
2 Blachana's liability for unpaid wages was premised on whether it was a "successor to the  
3 business" of NW Sportsbar. In answering that question during the administrative  
4 proceedings, BOLI analyzed

5 "[(1)] the name or identity of the business; [(2)] its location; [(3)] the lapse  
6 of time between the previous operation and the new operation; [(4)]  
7 whether the same or substantially the same work force [was] employed;  
8 [(5)] whether the same product is manufactured or the same service is  
9 offered; and [(6)] whether the same machinery, equipment, or methods of  
10 production are used."<sup>7</sup>

11 BOLI concluded that Blachana was a "successor to the business" of NW  
12 Sportsbar because it operated under a similar business name, used the same beer vendor,  
13 occupied the same physical space, used much of the same equipment to offer the same  
14 type of service (*i.e.*, food, drinks, and live music in a club atmosphere), and opened for  

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defining "successor" as

"one who follows an employer in ownership or control of a business so far  
as such employer has not paid employees in full. A successor employer  
may be any successor to the business of any employer, or any lessee or  
purchaser of any employer's business property for the continuation of the  
same business."

Blachana asserts that the administrative definition is duplicative of the statutory  
text in ORS 652.310(1), and, thus, it challenges only BOLI's action under ORS  
652.310(1). BOLI agrees that OAR 839-001-0500(10) tracks the text of ORS  
652.310(1). Because Blachana is challenging BOLI's determination that Blachana was an  
"employer" as the term is defined in ORS 652.310(1), we do not address OAR 839-001-  
0500(10).

<sup>7</sup> The parties dispute whether the factors applied by BOLI had the status of a rule  
adopted through agency adjudications. In any event, the legal issue is the same--whether  
BOLI's interpretation and application of ORS 652.310(1) was consistent with the  
legislature's intended meaning of that statute.

1 business only 47 days after NW Sportsbar ceased doing business.<sup>8</sup> Thus, BOLI  
2 concluded that Blachana fit within the definition of "employer" in ORS 652.310(1).

3           On appeal, Blachana contends that BOLI misinterpreted ORS 652.310(1)  
4 when it concluded that Blachana was a "successor to the business" of NW Sportsbar.  
5 When an agency's interpretation of a statute is at issue, as it is here, our review depends  
6 on the nature of the statutory term. *See Springfield Education Assn. v. School Dist.*, 290  
7 Or 217, 223, 621 P2d 547 (1980) (identifying "exact," "inexact," and "delegative"  
8 statutory terms and the proper method of analyzing each). The parties implicitly assume,  
9 and we agree, that the relevant wording of ORS 652.310(1), "any successor to the  
10 business," is an "inexact term." Inexact terms express a complete legislative policy but  
11 have a "less precise" meaning that initially requires agency interpretation. [\*J. R. Simplot\*](#)  
12 [\*Co. v. Dept. of Agriculture\*](#), 340 Or 188, 197, 131 P3d 162 (2006); [\*Coast Security\*](#)  
13 [\*Mortgage Corp. v. Real Estate Agency\*](#), 331 Or 348, 354, 15 P3d 29 (2000). An agency  
14 "may express their interpretation of the laws they are charged with administering either  
15 by adjudication or by rulemaking, or both." *Trebesch v. Employment Division*, 300 Or  
16 264, 273, 710 P2d 136 (1985).

17           We "review[ ] the agency's actions pursuant to [inexact terms] as a matter  
18 of law to determine whether the agency's action effectuated the legislative policy" in the  
19 statute. *J. R. Simplot Co.*, 340 Or at 197. To do so, we determine the legislature's

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<sup>8</sup> The only factor that BOLI found that was not indicative of successorship was that Blachana did not employ any of the same employees as NW Sportsbar.

1 intended meaning of the relevant statutory text, *Coast Security Mortgage Corp.*, 331 Or  
2 at 354, by examining the text and context of the statute, including any relevant legislative  
3 history, and, if ambiguity remains after that examination, resorting to applicable statutory  
4 construction canons. [\*State v. Gaines\*](#), 346 Or 160, 171-72, 206 P3d 1042 (2009).

5 "When applying [inexact terms] to specific facts, whether by order or by  
6 rule, the task of the agency, and ultimately of the court, is to determine whether the  
7 legislature intended the compass of the words to include those facts." *Springfield*  
8 *Education Assn.*, 290 Or at 224. Our task in this case, therefore, is to determine what the  
9 legislature intended in ORS 652.310(1) and whether the agency's action in this case--its  
10 determination that Blachana was a successor under the factors noted earlier--is consistent  
11 with that intended meaning. *Coast Security Mortgage Corp.*, 331 Or at 354.

12 On appeal, Blachana argues that the legislature intended to limit the  
13 meaning of "successor to the business" to the common-law principles of successor  
14 liability in corporate law. Blachana points to the "general rule" in corporate law that  
15 "where one corporation sells or otherwise transfers all of its assets to another corporation,  
16 the latter is not liable for the debts and liabilities of the transferor." Blachana notes that  
17 there are four recognized exceptions to that general rule. The "successor" corporation  
18 can be liable if (1) the new company agreed to assume the debt or liability, (2) the new  
19 company is a mere continuation of the old business, (3) the transaction was a *de facto*  
20 merger or consolidation, or (4) the transfer of assets to the new company was fraudulent.  
21 *See Erickson v. Grande Ronde Lbr. Co.*, 162 Or 556, 568, 92 P2d 170, *modified*, 94 P2d



1 139 (1939). Accordingly, Blachana contends that BOLI exceeded its statutory authority  
2 by impermissibly imposing liability on a corporate entity that bears no connection to NW  
3 Sportsbar and does not fit within any of the recognized exceptions to the "general rule."

4           We begin our inquiry with the relevant text. In examining statutory text,  
5 we give words of common usage their plain, natural, and ordinary meaning unless the  
6 text or context indicates that another meaning was intended. [Edwards v. Riverdale](#)  
7 [School District](#), 220 Or App 509, 513-14, 188 P3d 317 (2008). We give words that have  
8 well-defined legal meanings those meanings. [Bergerson v. Salem-Keizer School District](#),  
9 341 Or 401, 413, 144 P3d 918 (2006). None of the relevant terms in this case is defined  
10 in the statute, so we first look to definitions from dictionaries in use at the time that the  
11 statute was enacted to provide possible meanings. See [State v. Perry](#), 336 Or 49, 53, 77  
12 P3d 313 (2003). When the definition of "employer" was enacted by the legislature in  
13 1931, "successor" was defined by the dictionary at that time as

14           "[o]ne that succeeds or follows; one who takes the place which another has  
15           left, and sustains the like part or character; one who takes the place of  
16           another by succession[.]"

17 *Webster's New Int'l Dictionary* 2073 (1910). As a legal term at that time, "successor"  
18 was defined as

19           "[o]ne who succeeds to the rights or the place of another; particularly, the  
20           person or persons who constitute a corporation after the death or removal of  
21           those who preceded them as corporators."

22 *Black's Law Dictionary* 1674 (3d ed 1933). ORS 652.310(1) requires that a successor  
23 must be to *the* business of any employer. If successor is given its ordinary meaning, and

1 in light of the use of the definite article "the," an employer includes one that succeeds,  
2 follows, or replaces the predecessor in *the* business of that employer. Even if "successor"  
3 is given its legal definition, the possible meaning is similar: one that succeeds to the  
4 rights or place of the predecessor in the business. Both definitions imply that a  
5 "successor to the business" substitutes in the place of the predecessor in the business.

6           Those definitions, however, do not plainly resolve what it means to  
7 substitute in the place of the predecessor in the predecessor's business. On one hand, the  
8 legislature could have intended that a successor is only a party that succeeds, by some  
9 operation of law, to the legal rights and obligations of the predecessor. In that sense, the  
10 text at issue in this case would only encompass circumstances where a party could be  
11 held liable for the predecessor's liabilities as a function of the law outside ORS chapter  
12 652, such as contract, agency, common-law successor liability, or other statutory law. On  
13 the other hand, the legislature could have intended a broader meaning that would also  
14 encompass a successor that serves as a "functional" substitute for the predecessor in the  
15 business. In other words, a successor may include both a "legal substitute" for the  
16 predecessor as well as a party that replaces a predecessor in the business in a functional  
17 sense but does not necessarily assume the predecessor's rights and liabilities as a matter  
18 of any law other than ORS 652.310(1).

19           The context of the statute supports the conclusion that the legislature  
20 intended "successor to the business" to include only those parties that are "legal  
21 substitutes" for the predecessor. For context, we examine additional text in ORS

1 652.310(1) that informs legislative intent. As noted, an "[e]mployer" under ORS  
2 652.310(1) includes "any successor to the business of any employer, *or* any lessee or  
3 purchaser of any employer's business property for the continuance of the same business."  
4 (Emphasis added.) The legislature's use of "or" may indicate that the phrases are  
5 intended to be disjunctive and distinctive. An interpretation of the statute that would give  
6 distinctive meaning to both clauses would be that the legislature intended to impose  
7 liability in the first clause on a party that succeeds to the rights and liabilities of the  
8 predecessor as a matter of law and, in the second clause, defined an additional  
9 circumstance--when a party purchases or leases the employer's business property to  
10 continue the same business--in which a party that would not be liable as a "legal  
11 successor" could still be culpable for a wage claim. That reading of the text gives distinct  
12 meaning to both of those clauses in the statute. [State v. Mayorga](#), 186 Or App 175, 180,  
13 62 P3d 818 (2003) (statute should be interpreted, when possible, to give effect to all  
14 provisions). If we ascribe an intended meaning of "successor to the business" in the first  
15 clause to include "functional successors," the text in the second clause would then be  
16 duplicative in that a party that purchases business property to continue the same business  
17 is necessarily a functional replacement of the predecessor in the business.

18           The common-law context in which the legislature enacted the definition of  
19 "employer" now found in ORS 652.310(1) also informs the legislature's intent. See [Tyree](#)  
20 [Oil, Inc. v. BOLI](#), 168 Or App 278, 282, 7 P3d 571 (2000) (noting that the common law  
21 "sometimes is helpful in providing a backdrop against which the statute was enacted").

1 At the time that the legislature defined "employer" in the wage claim laws, the common-  
2 law rule cited by Blachana was in effect--that is, that the transfer or sale of assets  
3 between corporate entities does not automatically make the transferee liable for the  
4 transferor's debts and liabilities. *See Erickson*, 162 Or at 568. That common-law rule is  
5 based on the legislative policy that corporations are distinct corporate entities with a  
6 separate legal existence. *See [Dahlke v. Cascade Acoustics, Inc.](#)*, 216 Or App 27, 37, 171  
7 P3d 992 (2007), *rev den*, 344 Or 401 (2008). It follows, therefore, that the legislature  
8 understood "successor" to carry a technical meaning that reflected the policy that legal  
9 obligations in business are not transferred to separate entities absent some operation of  
10 the law. That policy, when considered with the legislature's use of "successor to the  
11 business," indicates that the legislature intended the definition of "successor" to be  
12 limited to a party that has succeeded by law to the legal rights and obligations of the  
13 predecessor in that business.<sup>9</sup>

14 In sum, the underlying context of ORS 652.310(1) indicates that the  
15 legislature intended that the employer that received the benefit of the wage claimant's  
16 services should be held liable for the obligation it incurred. By including "successor" in  
17 the statutory definition of employer, the legislature recognized that any party that, as a  
18 matter of law, assumed or had conferred upon it, the legal rights and obligations of the

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<sup>9</sup> To be clear, we do not hold that the legislature intended to limit liability in ORS 652.310(1) to only those parties that would be liable under the common-law rule of successor liability. Rather, that common-law rule merely provides important context for understanding the legislature's intent.

1 predecessor should also be held culpable for any wage claims. That understanding of  
2 legislative intent is consistent with the statutory text and the common-law context in  
3 which the statute was enacted.

4           We next evaluate whether Blachana was a "successor to the business" of  
5 NW Sportsbar in light of the intended meaning of ORS 652.310(1). Nothing in the  
6 record establishes that Blachana succeeded to the rights and obligations of NW Sportsbar  
7 as a matter of law. Blachana and NW Sportsbar were separate corporate entities and  
8 there was no contractual relationship between them. Blachana had no financial or  
9 ownership interest in NW Sportsbar. NW Sportsbar surrendered some, but not all, of the  
10 assets of the Portsmouth Club and Anchor Grill to Underhill, but there is nothing to  
11 indicate that any other interest of NW Sportsbar was surrendered. Nothing indicates that  
12 Blachana could be considered liable for NW Sportsbar's debts and liabilities under the  
13 common-law successor liability rule, and there does not appear to be any other source of  
14 law under which Blachana could be considered to have succeeded to the legal rights and  
15 obligations of NW Sportsbar. Accordingly, we conclude that BOLI erred in concluding  
16 that Blachana was a "successor to the business" of NW Sportsbar under ORS 652.310(1).

17           Reversed and remanded.